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No.

IN THE

Supreme Court of the United States

LEE E. GAHR, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit's Circuit Court's Decision affirming the District Court's entry of default judgment can stand in view of its complete departure from the accepted and usual course of judicial proceedings in that it so far departed from the standard applied in consideration Appellant's a motion to vacate a default judgment pursuant to Federal of Civil Procedure 60(b) that its impact effectively eviscerates Rule 60(b) if it is allowed to stand.

PARTIES TO THE PROCEEDING

Petitioner Lee E. Gahr was defendant and appellant in the proceedings below. Respondent United Stated Securities and Exchange Commission was plaintiff and Appellee in the proceedings below.

In addition to the parties listed in the caption, Chill Tech Industries, Inc. was a defendant in the proceedings in the District Court but were not an appellant below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THIS PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTE AND RULE INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 4

I. APPLICABLE STANDARD 4

II. APPELANT HAS A MERITORIOUS DEFENSE 6

III. THERE IS NO EVIDENCE OF CULPABLE CONDUCT 11

IV. LACK OF PREJUDICE TO PLAINTIFF 15

V. EQUITY DEMANDS THE DEFAULT JUDGMENT BE SET ASIDE 17

CONCLUSION 22

APPENDIX

CIRCUIT COURT ORDER (10/12/04) 1a

DISTRICT COURT DEFAULT JUDGMENT AGAINST DEFENDANT LEE E. GAHR (08/22/01) 4a

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF (09/05/00) 8a

NOTICE OF APPEAL (05/01/03) 23a

MOTION TO SET ASIDE DEFAULT (07/18/02) 25a

ORDER DENYING REHEARING (11/30/04) 113a

DISTRICT COURT ORDER (03/12/03) 114a

TABLE OF AUTHORITIES

Page

CASES

ACCU-WEATHER, INC. v. REUTERS LTD., 779 F. SUPP. 801, 802 (M.D. PA. 1991) 16

ALAN NEUMAN PRODS., INC. v. ALBRIGHT, 862 F.2D 1388 (9TH CIR. 1988) 11

AMERICAN ALLIANCE INS. CO. v. EAGLE INS. CO., 92 F.3D 57 (2ND CIR. 1996) 11, 12

BIEGANEK v. TAYLOR, 801 F.2D 879 (7TH CIR. 1986) 17

BOUGHNER v. SECRETARY OF HEALTH, EDUCATION AND WELFARE, 572 F.2D 976 (3RD CIR. 1978) 5

CRIPPS v. LIFE INSURANCE CO. OF NORTH AMERICA, 980 F.2D 1261 (9TH CIR. 1992) 4

ENRON OIL CORP. v. DIAKUHARA, 10 F.3D 90 (2ND CIR. 1993) 14

FALK v. ALLEN, 739 F.2D 461 (9TH CIR. 1984) ..... *passim*

GREGORIAN v. IZVESTIA, 871 F.2D 1515 (9TH CIR. 1989) 14

GROSS v. STEREO COMPONENT SYSTEMS, 700 F. 2D 120 (3RD CIR 1983) 6

HAZEL-ATLAS GLASS COMPANY v. HARTFORD EMPIRE COMPANY, 64 S.CT. 997, 322 U.S. 238, 88 L.ED. 1250 (1944) 19, 20

IN RE HAMMER, 940 F.2D 524 (9TH CIR. 1991) 4

IN RE STONE, 588 F.2D 1316, 1320 (10TH CIR. 1978) 6

ROOT REF. CO. V. UNIVERSAL OIL PRODS. CO., 169 F.2D 514 (3D CIR. 1948), CERT. DENIED, 69 S.CT. 481, 335 U.S. 912, 93 L.ED. 444 21

TCI GROUP LIFE INS. PLAN V. KNOEBBER, 244 F.3D 691 (9TH CIR. 2001) 4

TOSCANO V. COMMISSIONER OF INTERNAL REVENUE, 441 F.2D 930 (9TH CIR. 1971) 21

VALERIO V. BOISE CASCADE CORP., 80 F.R.D. 626, 640, AFF'D 645 F.2D 699 (9TH CIR. 1981) 21

MISCELLANEOUS

28 U.S.C. § 1254(1) 1

Lee E. Gahr ("Gahr") hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for Ninth Circuit.

OPINIONS BELOW

A default judgment was entered against Appellant by the United States District Court for the District of Nevada on August 22, 2001. Pet. App. 4a-7a. Appellant moved to set aside the default judgment on July 19, 2002. Pet. App. 25a-112a. The opinion of the United States District Court for the District of Nevada denying Appellant's motion to set aside the default judgment was entered on March 13, 2003 and is not reported. Pet. App. 114a. The order of the Court of Appeals denying the petition for rehearing was entered on November 30, 2004. Pet. App. 113a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 2004. A petition for rehearing was denied on November 30, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The rule involved in this case is Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect..." . . . . (The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

STATEMENT OF THE CASE

This case concerns a default judgment entered against Appellant and whether the District Court properly refused to vacate the default judgment and allow the action to proceed on the merits where the requisite factors existed for the District Court to vacate such judgment.

Appellee filed a Complaint in the United States District Court for the District of Nevada (referred to hereinafter as "District Court") on or about September 5, 2000, alleging various violations of the Securities Exchange Act and the rules promulgated there under. Pet. App. 8a-22a. The declaration of service filed in the District Court shows that Appellant, a Canadian national, was served on September 13, 2000, at a post office box in Vancouver, Canada. Appellant does not contest that he was originally served in that manner. For reasons not germane here, Appellant was unable to secure the advice of legal counsel or consent to the civil penalty proposed by Appellee.

Appellant emphatically denies the allegations lodged against him in the Compalaint by the Appellee. However, in view of the cost of litigating complicated securities matters, subsequent to the filing of the Complaint, Appellant engaged in protracted direct discussions with counsel for Appellee regarding the civil penalty proposed to be imposed upon Appellant by Appellee. Even though there were such constant and continuing discussions with the Appellee, at no time did counsel for Appellee indicate that Appellee would be moving for a Default Judgment. Given the fact that settlement discussions were ongoing, Appellant, perhaps erroneously, naïvely, and ill-advisedly assumed since ongoing discussions regarding the civil penalty were being made in a good faith effort the settle the matter, the negotiations would continue until a monetary figure could be mutually agreed upon.

On November 28, 2000, unbeknownst to Appellant, Appellee filed a Request for Entry of Default Judgment against Appellant. On August 16, 2001, Appellee filed its Motion for Default Judgment against Appellant. The District Court entered its Default Judgment against Appellant on August 22, 2001. On July 19, 2002, Appellant filed its Motion to Set Aside Default and Appellee filed it Response on August 5, 2002.

On March 13, 2003, the District Court entered its Order denying Appellant's Motion to Set Aside Default. (Pet. App. 114a). The United States Court of Appeals for the Ninth Circuit (the "Court of Appeals") filed its Memorandum Decision (the "Circuit Court Decision") affirming the District Court decision and denied

Appellant's Petition for Rehearing on November 30, 2004. (Pet. App. 113a).

REASONS FOR GRANTING THE PETITION

A writ of certiorari should be granted in this case because the Court of Appeals' Circuit Court's Decision so far departs from the accepted and unusual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

I. Applicable Standard

The law in the Ninth Circuit, as in most other Circuits, is that default judgments are "appropriate only in *extreme circumstances*" and that "a case should, *whenever possible*, be decided on the merits." TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691 (9th Cir. 2001), quoting Falk v. Allen, 739 F.2d 461 (9th Cir. 1984) (Emphasis added). Equity favors resolution on the merits, and when considering default, in the case of a defendant not represented by counsel, the court's discretion to set aside the default is especially broad. Cripps v. Life Insurance Co. of North America, 980 F.2d 1261 (9th Cir. 1992). Further, the law in the Ninth Circuit is that when a party has a meritorious defense, the rule allowing relief from a default judgment "must be liberally applied." In re Hammer, 940 F.2d 524 (9th Cir. 1991). Thus a pro se litigant against whom a default judgment has been entered, starts with a what is in essence a presumption that equity favors a determination of its case on the merits.

Particularly instructive it the Third Circuit's decision in Boughner v. Secretary of Health, Education and Welfare, 572 F.2d 976 (3rd Cir. 1978). There, the Third Circuit vacated a summary judgment and stated that "[w]e are not unmindful of the need for judicial eagerness to expedite cases, to fully utilize the court's time, to reduce overcrowded calendars and to establish finality of judgments. However, these commendable aspirations should never be used to thwart the objectives of the blind goddess." Id. at 979. In Boughner, the plaintiffs' attorney failed to file a response to the defendant government's motion for summary judgment. The plaintiffs' attorney cited a large caseload, involvement in his campaign to be elected to a judicial office and the loss of his secretary. The Third Circuit observed that these oversights "amounted to nothing sort of [plaintiffs' counsel] leaving his clients unrepresented." Id. at 977. Although Boughner involved a summary judgment, the result and rationale applied to reach that result is no different than for a judgment by default.

In the Ninth Circuit, the specific, well-established standard applied consists of a three-prong test utilized in determining whether a default judgment should be set aside. The three elements of the test are:

(1) whether the defendant has a meritorious defense;

(2) whether the plaintiff would be prejudiced by setting aside the default; and

(3) whether the defendant's culpable conduct led to the default.

Falk, 739 F.2d at 463. This test was adopted from the test utilized by the Third Circuit as set forth in Gross v. Stereo Component Systems, 700 F. 2d 120 (3rd Cir 1983).

In the instant matter, it is readily apparent that the Ninth Circuit failed to properly apply not only the three elements enunciated above but also completely ignored the application of the equitable considerations mandated in the administration of justice, and that such failure departs so far from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power.

II. Appellant Has A Meritorious Defense

The Ninth Circuit in TCI, addressing the meritorious defense issue, stated that the "burden on a party seeking to vacate a default judgment is not extraordinarily heavy." Id. at 700. The standard utilized is "whether the movant's version of the factual circumstances surrounding the dispute, if true, would constitute a defense to the action." In re Stone, 588 F.2d 1316, 1320 (10th Cir. 1978). Consequently, as the moving party on a motion to vacate a default judgment, the Appellant need only proffer facts that would constitute a defense to the action in order to satisfy this shibboleth.

Appellant respectfully submits that the language utilized in the Circuit Court Decision on the issue of the meritorious defense, to the effect that "*any* individual

may be liable for the" SEC's claims, is a serious misapplication of the Ninth Circuit's own standard. (Emphasis added.) Pet. App. 3a. The Circuit's Circuit Court Decision on this issue is an egregious example of am improper application of the relevant and applicable law to the facts at they exist in this matter and, more importantly, a blatantly erroneous statement of law. As the record demonstrates, and as more fully set forth below, Appellant was never an officer, director or ten percent shareholder of the Company whose actions formed the basis for the SEC's Complaint in this action. Additionally, since the gravamen of the SEC's underlying Complaint is premised upon classic antifraud statutory provisions, in addition to the Company's alleged sale of un-registered securities, it is axiomatic that, in order to prevail on those claims, the SEC must establish a minimal nexus between Appellant and the fraudulent acts attributable to the Company which the SEC has asserted as being violative of the statutory provisions of section 17 of the Securities Act of 1933 ("Section 17"), and Section 10(b) of the Exchange Act of 1934 ("Section 10(b)") in addition to the rules promulgated there under, i.e. Rule 10(b)(5). The facts set forth in Appellant's affidavit, which according to the mandate of the Ninth Circuit, must be taken as true. Falk, 739 F.2d at 464. Those facts provide an ample defense to the SEC's claims in this action.

Anti-Fraud Aspects of the Judgment Sought to be Sustained by the SEC

Whether it be Section 10(b) or Section 17, the standard anti-fraud statutory provision relied upon by the SEC, it is required that in instances where the

alleged conduct was actually corporate conduct, it is essential that the requisite state of mind violation of the statute constituting commission of securities fraud it must be possessed by the transgressor. Since corporations do not possess any such state of mind, said intent must be imputed to the corporation through the actions of its officers, directors or ten percent shareholders, or some others in such a control management position, in order to sustain the allegations and impose the civil liability sought by the SEC.

In the instant action, since no such "control" position was ever occupied by the Appellant (Pet. App. 52a-54a), imposing such liability is transparently flawed ab initio, and the holding of the Ninth Circuit is entirely without merit. It is equally elemental that holding one liable for such corporate acts of fraud or to a lesser extend, the sale by the corporation of its securities without either registration or an available exemption from registration, requires the application of one or more legal theories necessarily applicable to a "control" person such as officers, directors or ten percent shareholder. The Appellant held none of those positions. Pet. App. 52a-59a. It is for this reason that the SEC misleadingly and unethically pleaded that the Appellant was a "control" person, when no such role was ever so occupied; and it was clear error for the District Court to consider affidavits filed indicating that the SEC's naked representation was without foundation in fact or law.

The Appellant, in complete and open cooperation with the SEC, made voluntary production of his trading activity in the course of the SEC's original

investigation. Instead of using these paltry sums in its pleadings to the District Court, the staff of the SEC fraudulently represented either grossly inflated trading figures to the District Court and relied on them in its original Judgment; and erroneously refused to allow corrected figures in the instant application. Since the fraudulent conduct of the Plaintiff staff played an integral part in the original Judgment, even as a Default Judgment, this Court, when so notified, was bound to set aside such a fraudulently induced Judgment

As is demonstrated in clarion terms in the preceding factual portion of this Petition, a plethora of distortions in the Plaintiff's representations to this Honorable Court present a myriad of available defenses which can now be relied upon by Defendant in presenting the requisite showing of a "Meritorious Defense" in that Defendant:

1. Gahr was never a "control" person in any real sense, a principal in a management-consulting firm called Biscay Management & Consulting, Ltd.

2. Biscay had a management contract with Chill Tech Industries, Inc. doing ADMINISTRATION.

3. Gahr never had the responsibility to advance the sale of Chill Tech stock. Selling Chill Tech stock was the responsibility of Bruce Gorcyca a/k/a (Tony DiMarco) who was contracted

by Chill Tech's Board with that function.

4. Gorcyca was hired by Chill Tech's Board, not by Gahr.

5. All irregular email and false and misleading press releases were put out by Gorcyca, not Gahr.

6. All irregular emails were put out by this convicted crook Gorcyca, unbeknownst to Gahr and the Board.

7. The Korean can company misrepresented to Gahr and to the Chill Tech Board that the cans were Freon Free, AND getting EPA approval; and only through Gahr's intervention and authorizations of INDEPENDENT TESTING did he determine that the Koreans were misleading Chill Tech. Once this was learned, the Board immediately disclosed it in a press release.

8. Gahr did not take Chill Tech stock. What he had and sold was acquired through private transactions and in payment for past indebtedness.

9. The "profits" and finances alleged are apocryphal and entirely without foundation or support of any kind.

Thus, in order to sustain its legal position and prevail, the SEC necessarily must prove that Appellant has some semblance of a "control" position in that he is either an officer, director or ten percent shareholder. There is established evidence that Appellant did not hold any of these positions. Regardless of whether the SEC, in fraudulently obtaining its default judgment and in the subsequent pleadings filed in the District Court, provided a scintilla of evidence to overcome the Appellant's evidence of record, Appellant still meets this prong of the test.

III. There is no Evidence of Culpable Conduct

The Circuit Court Decision did not apply the correct standard with regard to that prong of the test relating to the determination of the conduct of the Appellant, as the moving party. In addition, the applicable standard, which is whether the Defendant was guilty of culpable conduct, has not been met here. Culpable conduct, as it relates to a Motion to Vacate a Default Judgment, is not the same as culpable conduct in the criminal context, which appears to be misapplied by the Ninth Circuit in the instant matter. The correct standard was stated in simple terms by the Ninth Court in TCI, wherein it was stated that a party's conduct is culpable if he "had notice of the filing of the action and *intentionally* failed to answer." Id. at 697, (emphasis in original) quoting-Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388 (9th Cir. 1988). The Ninth Circuit went on to elaborate in that statement when it asserted that what was meant by intentional was conduct that is "'willful, deliberate, or evidence of bad faith.'" Id., quoting American Alliance Ins. Co. v. Eagle Ins. Co., 92 F.3d 57 (2nd Cir. 1996). In TCI, the

Ninth Circuit held that "[n]eglectful failure to Answer as to which the Defendant offers a credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decision making, or otherwise manipulate the legal process is not 'intentional' under our default cases, and is therefore not necessarily--although it certainly may be, once the equitable factors are considered--culpable or inexcusable." Id.

Application of this standard to the facts in the record clearly demonstrates the absence of any culpable conduct whatsoever on the part of Appellant. Likewise, the record in the District Court action is devoid of even a scintilla of evidence of culpable conduct as that term has been established and so defined by the Ninth Circuit in TCI. The facts of record substantiate that Appellant, unable to afford the assistance of legal counsel, was in protracted, personal negotiations with the SEC throughout the period prior to the entry of the Default Judgment. Specifically, the record is equally and unequivocally clear that Appellant was not represented by counsel in the District Court action and that Appellant obtained representation only on an entirely different matter wherein Appellant was not in settlement negotiations with the SEC; and that case was not in a settlement negotiation posture. In fact, Appellant's personal participation in settlement negotiations is ample evidence of the antithesis of culpable conduct, that being a conscious endeavor to address the matter and involve himself in a good faith attempt to settle the claims made against him by the SEC by presenting persuasive evidence to rebut their unfounded claims.

The Ninth Circuit also made a fundamental error when it equated business acumen with legal sophistication, and then incorrectly theorized that legal sophistication equates to culpability. Such flawed logic is rather transparent. The Circuit Court Decision's reference to Appellant's "purported sophistication" in dealing with the American judicial process is equally unsupported by any facts in any part of the record. Moreover, and equally significant, is that a party's purported sophistication and knowledge of the American legal system even if true, which it is not, is irrelevant to the analysis of whether a party who is moving to set aside a default judgment is truly guilty of culpable conduct. If a party's sophistication and knowledge of the American legal system were factors in the analysis, Default Judgments entered by a party represented by counsel, who presumably is knowledgeable of the American legal system, ipso facto, would never meet the test for vacating such Judgments.

Likewise, the cases cited by the SEC in its reply brief relate entirely to situations with a major distinction from the instant matter in that those defendants simply failed to participate in the litigation and suffered a Default Judgment as a result of their failure to participate or acknowledge the fact that a Complaint had been filed. In other words, the defendants in those cases elected to ignore the fact that a complaint had been filed, effectively burying their heads in the sand. On the contrary, the record is evident that the instant Appellant did not engage in any avoidance tactics and was in active settlement negotiations with the SEC throughout the relevant period, which he naively believed to suffice. These

settlement negotiations related directly to the allegations contained in the SEC's Complaint and thus Appellant's conduct was anything but culpable. To the extent the SEC continued to engage Appellant in settlement negotiations yet, simultaneously seeking a Default Judgment in order to cement Appellant's liability, rendered the it is the SEC party guilty of culpable conduct, knowing well the nature of the Appellant, bereft, as he was, of the assistance of legal counsel.

The Ninth Circuit's culpability test is further elaborated on in Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir. 1989) where Ninth Circuit elucidated that culpability involves "not simply non-appearance following receipt of notice of the action, but rather *conduct which hindered judicial proceedings* as to which subject matter jurisdiction was unchallenged." Id. at 1522. (Emphasis added.) Not only does Appellant's conduct fail to meet this criteria, but, as discussed above, the record makes it patently obvious that Appellant voluntarily participated in settlement negotiations, the impact of which is to further the judicial proceedings in an attempt to resolve the case with lightened burden on the courts, and patently one not intended to hinder or otherwise interfere with the proceedings.

Significantly, and by way of repetition for the emphasis to which it is entitled, Appellant's participation in the instant action was pro se, since at that time completely unable to afford legal representation of any sort, the application of the Rule 55 test must be advanced to even greater leniency. Enron Oil Corp. v. Diakuhara, 10 F.3d 90 (2nd Cir. 1993).

The Circuit Court Decision cites to Appellant's hiring of counsel to represent him in another matter as evidence of his "sophistication in dealing with the American judicial process." However, this is patently an incorrect application of the fact to the applicable law for the following reasons: The fact that a defendant hired an attorney for one matter and not another provides absolutely no evidence of the defendant's legal sophistication, any more than filing an Answer denying allegations contained in a Complaint established a defendants lack of guilt. In addition, as more fully discussed elsewhere, the record is absolutely devoid of any evidence of Appellant's legal sophistication and, in light of the lack of any evidentiary relationship between legal sophistication and business sophistication, the Ninth Circuit's quantum leap in logic is simply an erroneous and faulty naked assumption with not even a scintilla of support.

IV. Lack of Prejudice to Plaintiff

Appellant, the SEC, suffers no prejudice if the Default Judgment were to be vacated and this case tried on its merits. To the contrary, vacating the Default prevents an unwarranted and unjustified "windfall" to the SEC in securing an enormous one half million dollar penalty against an individual of little or no financial means without putting on one shred of evidence in support of the same. Undoing such an unconscionable result can hardly be said to constitute a prejudice to the recipient of the benefit. In the Ninth Circuit, prejudice exists if a plaintiff's ability to pursue the claim is stymied by vacating the Default Judgment. Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). Stated somewhat differently, the legal standard established is

that prejudice exists "if circumstances have changed since entry of the default such that plaintiff's ability to litigate its claim is now impaired in some material way or if relevant evidence has become lost or unavailable." Accu-Weather, Inc. v. Reuters Ltd., 779 F. Supp. 801, 802 (M.D. Pa. 1991).

Utilizing this standard, there is simply no prejudice to SEC. Significantly, the SEC has not even put forth any demonstration as to how it would be impaired in any manner whatsoever by vacating the Default Judgment. The District Court's denial of Appellant's Motion for Reconsideration was appealed immediately following the District Court's decision and the SEC has not demonstrated nor even alleged that relevant evidence has become unavailable. The only evidence necessary to litigate this matter are the documents already in the possession of the SEC and the testimony of Appellant, which, incidentally was never even allowed at any level of the preceding judicial proceedings.

The SEC's only argument for prejudice is that in the three cases it cites there was a shorter period of time between the default judgment and the motion to vacate. However, the standard is not to compare the facts of this case with the facts of other decided cases but as this Circuit has held in Falk, the standard and test is whether the ability of the Plaintiff, here the SEC, to pursue the case will be hindered. The SEC simply makes the statement that prejudice should be presumed. That naked assertion is clearly not the standard enunciated by this Circuit, or any other known circuit for that matter.

The SEC itself has demonstrated that its ability to pursue this case has not been hindered in any way. The SEC obtained an injunction against Appellant in the Companion Case and the very same evidence the SEC utilized to prove its case in that matter is available to the SEC here. Accordingly, the SEC has failed to demonstrate any prejudice to its ability to prove its case.

This litigation involves the problematic actions of an overzealous staff of a federal agency victimizing the defendant, an unrepresented, unsophisticated foreign national, who was clearly overwhelmed by the turn of events of an SEC investigation in the first place. Any financial cost to the Federal government is minimal in comparison to the fines, levies, and costs to the Defendant in both financial and reputation losses, should the Plaintiff be allowed to continue to prevail.

V. Equity Demands The Default Judgment Be Set Aside

A. Defendant Gahr is a Foreign National and was Not Represented.

In a closely parallel Seventh Circuit case, Bieganek v. Taylor, 801 F.2d 879 (7th Cir. 1986), involving a default judgment predicated upon claims which were asserted under the federal sister statute, the Commodity Exchange Act, inter alia, aligning defendant's fraudulent investment conduct against a British citizen, the Court on appeal set aside the default. The Seventh Circuit based its decision to vacate the default judgment upon a showing that: 1) the defendant asserted meritorious defenses; 2) there was

an absence of defendant's willful defiance; and 3) a great unfairness could result were the judgment not to be set aside. All conditions extant in the instant matter.

In fact a case can be made that Appellant's situation is even more deserving of equitable relief that the defendant in Bieganek. Appellant here, as the defendant in Bieganek, has demonstrated a meritorious defense, the lack of any culpable conduct and the fundamental inequitable result if the judgment were to stand. The judgment in the instant action is more than twice as much as the judgment in Bieganek. Appellant is an individual without means to even contemplate paying such an enormous penalty of in excess of one half million dollars. Unlike, the defendant in Bieganek, Appellant was in settlement negotiations when the Appellee sought and obtained a default judgment. Not only is this facially inequitable, but this has a substantial unsettling and chilling effect on parties proceeding pro se. This situation essentially gave plaintiff's license to play fast-and-loose with the ethical mandates and violate simple notions of fairness in that their conduct would lead one to believe they were free to deceive or simply mislead the defendant and, simultaneously obtain a default judgment, which is exactly what they did.

B. A Substantial Sum of Money is Involved

Historically Courts have been reluctant to uphold default judgments where substantial amounts of money are involved. They make every effort to avoid determining matters involving large sums through

default if it can reasonably be avoided. (Wright and Miller, Federal Practice and Procedure, §2681.)

Not only is a substantial sum of money involved -- $507,818 plus interest – so that Defendant Gahr faces financial ruin as a result of this default judgment being entered against him. This fact alone militates strongly in favor of reversing the Circuit Court Decision and setting aside the default, in order to allow the District Court to hear the case on its actual merits.

C. Actions of Plaintiff's Counsel are Tantamount to "Fraud on the Court

The landmark case in this area of Rule 60(b) powers of a Court to set aside a judgment for "fraud on the Court" dealt with the contrivances and misconduct on the part of an opposing lawyers, just as we have not so extravagantly alleged in the instant matter. Hazel-Atlas Glass Company v. Hartford Empire Company, 64 S.Ct. 997, 322 U.S. 238, 88 L.Ed. 1250 (1944).

Speaking for the Supreme Court, Justice Black held that the judgment must be vacated by reason of the attorneys' improper conduct, which constituted the fraud upon the Court. This holding has stood the test of time, and states that:

> Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possible

> to have been guilty of perjure. Here ... we find a deliberately planned and carefully executed scheme to defraud ... the Circuit Court of Appeals. (*Hazel-Atlas*, 64 S.Ct. at 1001, 32 U.S. at 245.)

Here the Court pointed out that the case did not concern only private parties and that there were "issues of great moment to the public."

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud. [*Ibid. Emphasis added.*]

The Court determined that it need not decide to what extent the conduct had impressed the judges who voted to uphold the patent nor was it even relevant whether the statements were true (which in the Gahr situation they are). The presence of a fraud on the Court alone was sufficient to set aside the judgment.

Counsel's research indicates that almost all of the principles that govern a claim of "fraud on the court" are derivable from the Hazel-Atlas case. Simply stated in its boldest terms, the power exists in every court. Accordingly, if it is found in the instant matter that there was a "fraud on the court," which would seem to be indicated in clarion terms by the myriad instances of misrepresentation recited in this pleading, and the exhibits thereto, the Supreme Court has stated in unequivocal terms that the judgment should be vacated and the offending party (in this case, the U.S. government through the offices of the Securities and Exchange Commission), must be denied ALL relief. Root Ref. Co. v. Universal Oil Prods. Co., 169 F.2d 514 (3d Cir. 1948), *cert. denied*, 69 S.Ct. 481, 335 U.S. 912, 93 L.Ed. 444.

Finally, as regards the issue of the passage of time in bringing this action before this Honorable Court, it has been held, in reliance on a Ninth Circuit case, Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 640, *aff'd* 645 F.2d 699 (9th Cir. 1981), that there is no statute of limitations for fraud on the court. Further, it has likewise been held that there can be no bar to the consideration of such action predicated on the doctrine of laches, predicated on the Hazel-Atlas holding, and followed by a number of lower Courts including the Ninth Circuit. Toscano v. Commissioner of Internal Revenue, 441 F.2d 930 (9th Cir. 1971).

For the reasons outlined above, this Court should grant this Petition for Certiorari in order to allow a trial on the merits to take place and prevent the Ninth Circuit's decision in this matter from raising the

bar on Motions to Set Aside Default Judgments from others similarly situated to a point beyond reach..

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 03-15879

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff - Appellee,

v.

LEE E. GAHR,
Defendant - Appellant.

October 7, 2004 **, Submitted, San Francisco, California** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

October 12, 2004, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For SECURITIES AND EXCHANGE COMMISSION, Plaintiff - Appellee: Julie K. Lutz, U.S. SECURITES & EXCHANGE COMMISION, Denver, CO. Leslie E. Smith, SEC - SECURITIES & EXCHANGE COMMISSION, Washington, DC.

For LEE E. GAHR, Defendant - Appellant: Charles R. McCarthy, Jr., Esq., O'CONNOR & HANNAN, Washington, DC.

JUDGES: Before: RYMER, TALLMAN, and BEA, Circuit Judges.

OPINION: MEMORANDUM *

Petitioner Lee E. Gahr, a Canadian national, appeals from the district court's entry of default judgment against him after he failed to file an answer to a Securities and Exchange Commission ("SEC") complaint alleging various violations of federal securities laws in connection with Chill Tech, Inc. He argues that his failure to answer the complaint was "excusable neglect" under Fed. R. Civ. P. 60(b), caused by his naivete and unfamiliarity with the American judicial system. We reject his argument and affirm the district court's decision.

To successfully set aside a default judgment because of excusable neglect, Gahr must demonstrate that: (a) he was not culpable of conduct that led to the default; (b) he has a meritorious defense to the complaint; and (c) the SEC would not be prejudiced by reopening the case. Franchise Holding II, LLC v. Huntington Restaurants Group, Inc., 375 F.3d 922, 926 (9th Cir. 2004). Gahr bears the burden of demonstrating that all three factors weigh in favor of vacating the default judgment. Cassidy v. Tenorio, 856 F.2d 1412, 1415 (9th Cir. 1987).

Gahr has failed to demonstrate that any of the three factors favor vacatur. The record indicates that Gahr

knew the SEC had filed a complaint against him, initially requested an extension, acknowledged that he was required to file an answer in district court, and retained an attorney to represent him on other matters related to the SEC's investigation -- all evidence of his comprehension and sophistication in dealing with the American judicial process. Yet, inexcusably, Gahr failed to file any answer.

Secondly, Gahr's supposed meritorious defense, that he was not a "control person" in Chill Tech, Inc., is irrelevant since any individual may be liable for the claims brought by the SEC in its civil enforcement action. And finally, Gahr has supplied no evidence that the SEC will not be prejudiced by reopening the case.

Thus, because Gahr meets none of the conditions excusing him from filing an answer, we AFFIRM the district court's entry of default judgment. Each party is to bear its own costs.

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

CV-S-00-1088-KJD-RJJ

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

LEE E. GAHR, and CHILL TECH
INDUSTRIES, INC.,
Defendants.

Filed August 22, 2001

DEFAULT JUDGMENT AGAINST
DEFENDANT LEE E. GAHR

Plaintiff Securities and Exchange Commission (the "Commission"), filed its Complaint for Injunctive and Other Legal Relief ("Complaint") in this action against, among others, defendant Lee E. Gahr ("Gahr"). The C Commission alleged that Gahr violated Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)], Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)], Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)],and Rule 10b-5 promulgated thereunder [17 C . F. R. § 240.10b-5]. Gahr failed to file an answer, or to otherwise plead, and the time for such pleading has expired.

Upon plaintiff's motion based upon Gahr's failure to answer or otherwise plead, this Court hereby enters default judgment against Gahr pursuant to Federal

Rule of Civil Procedure 55(b). This Court has jurisdiction over Gahr and over the subject matter of this action by virtue of Section 22(a) of the Securities Act [15 U.S.C. §77v(a)] and Sections 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 78v and 78aa]. Accordingly, this Court awards the plaintiff all injunctive and ancillary relief sought in its complaint.

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Gahr and his officers, agents, servants, employees, attorneys, and those persons in active concert or, participation with him, who receive actual notice of this Final Judgment, by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from, directly or indirectly, in the offer or sale of any securities, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails:

A. employing any device, scheme or artifice to defraud;

B. obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

C. engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser; in violation of Section 17(a) of the Securities Act [15 U.S.C. C. § 77q(a)].

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Gahr and his officers, agents, servants, employees, attorneys, and those persons in active concert or participation with any of them, who receive actual notice of this Order, by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from, directly or indirectly, in connection with the purchase or sale of any securities, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

A. employing any device, scheme or artifice to defraud;

B. making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

C. engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person:

in violation of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Gahr, his agents, servants, employees, attorneys-in-fact and all persons in active concert or participation with him who receive actual

notice of this Order by personal service or otherwise, and each of them, be and they hereby are restrained and enjoined from violating Sections 5(a) and 5(c) of the Securities Act by, unless a registration statement is in effect as to a security, Default Judgment .

There being no just reason for delay, the Clerk of the Court is hereby directed, pursuant to Rule 45(b) of the Federal Rules of Civil Procedure, to enter this Final Judgment forthwith.

DATED: 21 Aug, 2001

UNITED STATES DISTRICT JUDGE

Presented by:

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CV-S-00-1088-KJD-RJJ

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

LEE E. GAHR, and CHILL TECH
INDUSTRIES, INC.,
Defendants.

Filed September 5, 2000

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff Securities and Exhange Commission. ("Commission"), for its complaint alleges as follows:

I. SUMMARY OF THE ACTION

1. Between approximately September 1998 and May 2000, Chill Tech Industries, Inc. ("Chill Tech"), through its chief operating officer Lee E. Gahr ("Gahr"), made numerous false and misleading statements through an Internet website, various press releases, phony unsolicited faxes, and a magazine article. These statements concerned: (1) the "environmentally friendly" nature of, purported testing of, and Chill Tech's ability to manufacture, the "Arctic Can," purportedly self cooling beverage can; (2) presentations of the Arctic Can to various well-known

companies and governmental entities and related revenue and earnings projections; (3) financial and stock projections, and predictions of future listing of Chill Tech's stock on the Nasdaq Stock Market, In. ("Nasdaq"); and (4) Chill Tech's receipt of financing commitments and agreements to acquire substantial assets.

2. Gahr, who ran Chill Tech pursuant to a management agreement, was responsible for all of the above statements.

3. Certain of the above statements caused the price and volume of Chill tech stock to increase significantly in the short term.

4. While Gahr was disseminating the' false press releases, he personally sold 1,056,500 shares of Chill Tech common stock far profits of at least $278,738.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act of 1933 [15 U.S.C. §77u(a)] ("Securities Act") and Sections 21(e) and 27 of the Securities and Exchange Act of 1934 [15 U.S.C. §§78u(e) and 78aa] ("Exchange Act"). Venue lies in this Court pursuant to Section 22(a) of the Securities Act and Section 27 of the Exchange Act.

6. In connection with the transactions, acts, practices, and courses of business described in this Complaint, each of the defendants, directly and indirectly, has made use of the means or instrumentalities of interstate commerce, of the mails,

and/or of the means and instruments of transportation or communication in interstate commerce.

7. Defendant Chill Tech resides within this judicial district. Additionally, certain of the transactions, acts, practices and course of business constituting the violations of law alleged occurred within this judicial district.

III. DEFENDANTS

8. Lee E. Gahr, age 36, is a resident of Vancouver, British Columbia, and was appointed chief operating officer on December 8, 1998. Gahr was in charge of the day-to-day operations of Chill Tech pursuant to management agreement between Chill Tech and Biscay Management and Consulting Ltd. ("Biscay"), a private company that Gahr operated.

9. Chill Tech is a Nevada corporation.

IV. BACKGROUND

A. STATEMENTS MADE BY CHILL TECH AND GAHR

10. Between September 1995 and August 17, 1999, Chill Tech issued 11 false and misleading press releases.

11. By no later than March 1999, Chill Tech pasted on its Internet web site, www.chilltech.com, past press releases dating back to November 1998. Chill Tech posted press releases dated as follows on its Internet website soon after they were issued: November 6, 1998; December 11, 1995; February 5, 1999; February 22,

1999; March 1, 1999; March 3, 1999; March 7, 1999; March 10, 1999; March 14, 1999; and May 3, 2000.

12. Sometime between February and April 1999, at least two individuals in the United States received phony faxes touting Chill Tech stock. The faxes purported to consist of a promotional article concerning Chill Tech published in "Vision," a fictitious magazine supposedly published in Geneva, Switzerland.

13. A promotional article touting Chill Tech was published in the April 1999 issue of Market Pulse Journal, a quarterly publication with an unpaid circulation of approximately 20,000.

14. These press releases, Internet website, phony faxes, and magazine article contained false and misleading statements concerning: (1) the "environmentally friendly" nature of, purported testing of, and Chill Tech's ability to manufacture, the "Arctic Can," purportedly self-cooling beverage can; (2) "presentations" of the Arctic Can with a view towards selling the product to various well-known companies and governmental entities; (3) financial and stock price projections, and predictions of future Nasdaq listing; and (4) Chill Tech's receipt of financing commitments and agreements to acquire substantial assets.

15. Gahr and Chill Tech were the source of the statements contained in the press releases, Internet website, phony faxes, and the Market Pulse Journal article, or Gahr and Chill Tech drafted, approved, and/or reviewed such statements prior to their issuance.

B. MISREPRESENTATIONS MADE BY CHILL TECH AND GAHR

16. Gahr and Chill Tech publicly disseminated the following statements:

(a) In five press releases (issued December 11, 1998; February 5, 1999; March 1, 1999; March 3, 1999; and May 12, 1999), Chill Tech stated that the Arctic Can was a "technologically feasible, environmentally friendly, and economically competitive" product and in two press releases (issued September 9, 1998 and November 6, 1998), Chill Tech stated that it was developing a "self-chilling beverage can."

(b) In a press release issued December 11, 1998, Chill Tech stated that all research and development of the Arctic Can had been completed and prototypes were being tested.

(c) In three press releases Chill Tech stated that it had negotiated with a German manufacturing company, GEMI, S.R.O. ("GEMI"), a follows:

(i) In a press release issued on February 5, 1999, Chill Tech stated that it had received a letter of intent from GEMI for the manufacturing of the Arctic Can;

(ii) In a press release issued on February 22, 1999, Chill Tech stated that talks regarding manufacturing between Chill Tech and EMI were continuing; and

(iii) In a press release issued on March 1, 1999, Chill Tech stated that it had entered into a "manufacturing agreement" with EMI for GEMI to manufacture the

Arctic Can:

(d) In three press releases Chill Tech stated that it had made presentations of the Arctic Can with a view towards selling the product to various companies and government entities as follows:

(i) In a press release issued On March 3, 1999, Chill Tech stated that it had made an "official presentation" both to employees of the U.S. Navy and members of the U.S. Senate Armed Services Committee;

(ii) In a press release issued on March 10, 1999, Chill Tech stated that it had made a "proposal" to the U.S. Federal Emergency Management Agency ("FEMA"); and,

(iii) In press release issued on March 14, 1999, Chill Tech stated that DelMonte Foods Corp. ("DelMonte") had invited Chill Tech to make a "presentation" later that month and that DelMonte was "extremely interested" in the Arctic Can.

(e) Chill Tech and/or Gahr made financial projections as follows:

(i) In a press release issued on March 3, 1999, Chill Tech stated that its profits from a contract with the U.S. Navy would exceed $5 million dollars per year.

(ii) In press release issued on March 10, 1999, Chill Tech stated that a contract with FEMA could generate up to "an additional three million dollars worth of annual revenue."

(iii) In an April 1999 article published in the Chill Tech stated that it would earn more than $9 million during its "first year" of operations, more than $28 million during the second year, and "an estimated" $48 million by the third year.

(iv) The phony faxes stated that Chill Tech common stock would reach a price of $15-$20 a share by the year 2000.

(f) Chill Tech claimed to have received offers of financing from The Globus Croup ("Globus") as follows:

(i) In a press release issued on larch 1, 1999, Chill Tech stated that it had received an offer of $12 million in financing by Globus; and

(ii) In press release issued on March 7, 1999, Chill Tech stated that it would pursue the acquisition of $4 million worth of "NASD-approved assets in the form of television air time" in deal developed by Globus.

(g) The March 7, 1999 press release further stated that Chill Tech's acquisition of assets in the form of television air time would provide the company with "the asset base" required to be quoted on the Nasdaq Small Cap market.

(h) The phony faxes stated that corporate entities Anheuser-Busch Cos. Inc. and The Coca-Cola Co. were "rumored to be proposing buy-outs" of Chill Tech.

17. The foregoing statements were false and/or misleading for the following reasons:

(a) The Arctic Can was not "environmentally friendly" since the product contained Freon, a substance banned because of environmental concerns under international treaty since 1996 - - a fact which the company admitted in a lay 3, 2000 press release but failed to disclose in any of its prior press releases, included those issued on September 9 and November 6, 1998.

(b) No product testing was begun before early 2000.

(c) No letter of intent was signed and no manufacturing agreement existed between Chill Tech and GEMI.

(d) No face-to-face meetings or other presentations regarding the Arctic Can occurred:

(i) Chill Tech merely mailed unsolicited correspondence to the U.S. Navy and no correspondence was sent to the members of the U.S. Senate Armed Committee Services Senate;

(ii) Chill Tech merely mailed unsolicited correspondence to FEMA;

and

(iii) DelMonte was not "extremely interested" in the Arctic Can and no meeting or other "presentation" had been scheduled. DelMonte requested additional information about the Arctic Can that the Defendants never provided.

(e) The financial projections in the March 3, 1999

press release, the March 10, 1999 press release, the Market Pulse Journal, and in the phony faxes each lacked a reasonable basis because, among other reasons, they were predicated on fictitious business relationships and undermined by Chill Tech's developmental stage status, lack of a viable product, and lack of significant assets or revenues.

(f) The March 1, 1999 and March 79 1999 press releases regarding financing were each false because neither Globus nor its principal Bruce Gorcyca a/k/a/ Anthony DiMarco ("DiMarco") possessed or otherwise had access to the represented assets or financing.

(g) The March 7, 1999 press release was false because Chill Tech lacked the assets, capitalization, net income and/or bid price necessary to satisfy Nasdaq's requirements for listing.

(h) The claims in the phony faxes regarding a "buyout" of Chill Tech by Anheuser-Busch were false because Anheuser-Busch never considered business combination with Chill Tech.

V. MARKET IMPACT

18. Some of the false statements disseminated by the Defendants substantially impacted the market for Chill Tech Stock.

19. The closing price of Chill Tech stock increase between 15% and 94% on the dates of four of the press releases. These included: the September 9, 1995 press releases initially touting the Arctic Can (closing price increase by 89% from $1.03 to $2); the December 11,

1998 press release concerning testing and manufacturing of the Artic Can (closing price increased by 15% from 1.03 to $1.19); the March 10, 1999 press release regarding a purported business relationship with FE MA (closing price increased by 21 % from $.75 to $.91); and the August 17, 1999 press release disclosing delays in producing the Arctic Can, but expressing confidence in eventual production (closing price increased by 94% from $.16 to $.31). In addition, reported volume on the dates of six of the press releases increased between 51 % and 734%.

VI. GAHR'S TRADING

20. From January through December 1999, Gahr sold at least 1,056,500 shares of Chill Tech common stock at prices between $1.09 and $.04 per share through Canadian and U.S. brokerage accounts in his and Biscay's names.

21. At least some of these shares carne directly from Chill Tech and were issued between December 1995 and June 1999.

22. On four occasions, Gahr sold stock on the date of, or one day after, the issuance of a false press release by Chill Tech.

23. Gahr realized profits of at least $278,738 through these sales.

FIRST CAUSE OF ACTION

(Violations of Exchange Act § 1 0(b) and Rule 1 0b-5)

24. Plaintiff repeats and realleges paragraphs 1 through 23 above.

25. Defendants Gahr and Chill Tech, with scienter, in connection with the purchase or sale of securities, by the use of means or instrumentalities of interstate commerce or of the mails, directly or indirectly: (a) employed devices, schemes or artifices to defrauds (b) made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, the light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers of securities in violation of Section 10(b) of the Exchange Act [15 U.S.C. §78j(b)] and Rule 10b-5 [17 C.F.R. §240.10b-5] thereunder.

26. By reason of the foregoing, Defendants Gahr and Chill Tech violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and unless restrained and enjoined will continue to do so.

SECOND CAUSE OF ACTION

(Violations of Securities Act § 17(a)(1))

27. Plaintiff repeats and realleges paragraphs 1 through 23 above.

28. Defendant Gahr; with scienter, in the offer or

sale of securities, by the use of means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly employed devices, schemes or artifices to defraud in violation of Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)]. 29. By reason of the foregoing, Defendant Gahr violated Section 17(a)(1) of the Securities Act and unless restrained and enjoined will continue to do so.

THIRD CAUSE OF ACTION

(Violations of Securities Act §§ 17(a)(2)and (3))

30. Plaintiff repeats and realleges paragraphs 1 through 23 above.

31. Defendant Gahr, in the. offer or sale of securities, by the use of means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly (a) obtained money or property by means of untrue statements of material fact and by omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (b) engaged in transactions, practices or courses of business which operate, operated or would operates a fraud or deceit upon purchasers of securities in violation of Sections 17(a)(2) and (3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and (3)].

32. By reason of the foregoing, Defendant Gahr violated Sections 17(a)(2) and (3) of the Securities Act and unless restrained and enjoined will continue to do

so.

FOURTH CAUSE OF ACTION

(Violations of Securities Act § 5(a) and 5(c))

33. Plaintiff repeats and realleges paragraphs 1 through 23 above.

34. Defendant Gahr, directly and indirectly, in connection with the sale and offer to sell securities by the means or instruments of transportation or communication in interstate commerce, or the mails, has:

35. Caused to be carried through the mails or in interstate commerce securities for the purpose of sale or for delivery after sale when no registration statement was in effect; and

36. By reason of the foregoing, Defendant Gahr violated Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)].

WHEREFORE, the Commission respectfully requests that this Court:

I.

Enter a permanent injunction restraining and enjoining Defendants Gahr and Chill Tech, their subsidiaries, officers, directors, agents, servants, employees, and attorneys-in-fact, and all persons in active concert or participation with there, and each of there, from violating, directly or indirectly, Section 10(b) of the

Exchange Act and Rule 10b-5 thereunder.

II.

Enter a permanent injunction restraining and enjoining Defendant Gahr his subsidiaries, officers, directors, agents, servants, employees, and attorneys-in-fact, and all persons in active concert or participation with hire from violating, directly or indirectly, Sections 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act.

III.

Enter a permanent injunction restraining and enjoining Defendant Gahr, his subsidiaries, officers, directors, agents, servants, employees, and attorneys-in-fact, and all persons in active concert or participation with hire from violating, directly or indirectly, Sections 5(a) and 5(c) of the Securities Act.

VI.

Grant such other relief a this Court may deem just or appropriate.

V.

Order Defendant Gahr to pay civil money penalties pursuant to Section 20(d)(i) of the Securities Act [15 U.S.C. 77t(d)(i)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. 78u(d)(3).

VI.

Grant such other relief as this Court may deem just or appropriate.

Dated: 9/5, 2000

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CV-S-00-1088-KJD-RJJ

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

LEE E. GAHR, ,
Defendant.

Filed May 1, 2003

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice is hereby given that Lee E. Gahr, the Defendant in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order entered in this action on the 13th day of March, 2003.

Dated: April 30, 2003

Respectfully submitted,

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Case No. CV-S-00-1088-KJD-RJI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

LEE E. GAHR
Defendant.

MOTION TO SET ASIDE DEFAULT

COMES NOW Lee E. Gahr, a Defendant herein, and moves this Honorable Court for an order setting aside the default, and allowing him to appear and file an Answer in this matter. This Motion is made and based

on the attached Points and Authorities, Affidavits and Exhibits filed herewith, and all other pleadings and other papers on file herein.

DATED July 18, 2002

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POINTS AND AUTHORITIES

I. NATURE OF THE MOTION

At the heart of the matter lies an inexperienced, naive, foreign and then impecunious Defendant, Lee E. Gahr, who erroneously believed that Plaintiff, the Securities and Exchange Commission, being an agency of the U.S. Government, was going to continue monetary negotiations in good faith with him, an unrepresented Defendant. He reached this conclusion based upon continuing conversations which he had had with Plaintiffs attorneys centering mainly on, not the injunction the government was threatening, (since the alleged activities which were to be constrained by an injunction were not activities in which he had engaged at any time in his life), but rather the sums of monies the government was levying against him through fines and penalties.

The failure to file the Answer to the Government's complaint was not the result of any culpable conduct on Defendant Gahr's behalf, but resulted from a misunderstanding with Plaintiffs counsel and from Gahr's inability to afford the services of competent legal counsel to advise him on how to deal with the situation which he was then confronting. Coupled with that faux pas, were the hyperbolic misrepresentations made to this Honorable Court by the Plaintiff's lead counsel, Andres Guevara, Esquire.

Should this Honorable Court mercifully grant him the relief he seeks and undo the profound hardship and manifest injustice visited upon him, no prejudice will result to the Plaintiff, while conversely allowing

Defendant Gahr to reach the merits of this case, and to reclaim his good name and reputation. Accordingly, for the reasons set forth below, we respectfully ask that the default judgment be set aside and Defendant Gahr, now represented by the undersigned counsel, be allowed to fully and fairly present his case before this Honorable Court.

II. ISSUE PRESENTED

SHOULD THIS COURT SET ASIDE A DEFAULT JUDGMENT UNDER FED. R. CIV. P. 60(b) WHEN THE DEFAULT WAS NOT CAUSED BY THE INATTENTION OF THE DEFENDANT, THE DEFENDANT HAS MERITORIOUS DEFENSE, AND NO REAL PREJUDICE WOULD RESULT TO THE PLAINTIFF?

III. FACTS

The Plaintiff, The Securities & Exchange Commission ("SEC" or the "Commission) filed the original action on or about September 5, 2000. (See Complaint on file herein.) The declaration of service on file shows that Defendant Lee Gahr, a Canadian national, was served on September 13, 2000, at a post office box in Vancouver, Canada. Defendant Gahr does not contest that he was originally served in this manner. However, at that time Defendant Lee Gahr was experiencing financial difficulties, which made it impossible for him to secure the advice of legal counsel or consent to the civil penalty proposed by the Plaintiff.

Because he was at the time financially distressed as a result of his own involvement with Chill Tech, there

ensued protracted direct discussions between he and lawyers for the Commission, principally with Plaintiff's Lead Staff Attorney, Andres Guevara, Esquire, regarding the proposed civil penalty proposed to be imposed upon him by the Plaintiff.

Even though there were such constant and continuing discussions with the Plaintiffs Attorney, at no time did Guevara indicate that they were moving for a Default Judgment; and Defendant Gahr erroneously, naively, and ill-advisedly assumed these ongoing discussions regarding the civil penalty, et. al. would continue ad infinitem until a monetary figure could be mutually agreed upon.

Knowing that he was unable to afford the assistance of counsel, the Plaintiff's attorney took advantage of Gahr's naive ignorance and, most importantly, misrepresented and exaggerated a myriad of facts to this Honorable Court in order to readily secure a Default Judgment against Defendant Gahr. In so doing, Plaintiff gravely mischaracterized the Defendant Gahr's role at the co-defendant Chill Tech, and responsibilities and in this distortion denied him some of his most basic and inalienable rights and entitlements. This default judgment unilaterally imposed on Defendant Gahr ruinous economic sanctions, fines, and penalties exceeding one-half million dollars - $507,818, plus interest, to be exact.

The aforesaid flagrant misrepresentations to this Honorable Court, employed by the Plaintiffs Staff attorney, one Andres Guevara, Esquire, are so profound and pernicious as to suggest an incredibly flawed and incompetent investigatory process, or worse

yet, a pattern of malicious prosecutorial abuse. Taken as a whole, they rise to the level of a "fraud on this Court" as that term has been defined by various Courts within the Ninth Circuit and elsewhere.

As will be supported by the following, including supporting affidavits and exhibits thereto, these patent misrepresentations to the Court include the following:

1. Defendant Lee E. Gahr was described in the Plaintiffs Complaint and Affidavit as the COO of Chill Tech, Inc. (hereinafter "Chill Tech"). In fact, Defendant Gahr was NEVER an officer, director, or major shareholder of Chill Tech; never had the required "control" position so as to expose him to the potential "affiliate" legal status as set forth in §17(a) of the Securities Act and §10(b) of the Securities Exchange Act, or Rule l0b-5 promulgated thereunder. In reality; another Company of which he was President, Biscay Management & Consulting, Ltd., had merely a management contract with Chill Tech to do administrative work for Chill Tech. (See Exhibit 1.)

2. The two aforementioned statutory sections of the Federal Securities laws (i.e., Section 17(a)(1) of the Securities Act [15 U.S.C. §77q(a)(1)] and Section 10(b) of the Exchange Act [15 U.S.C. §78j(b)], and Rule lob-5 thereunder) simply stated, address the sale of securities by reason of false and misleading sales practices of one sort or another, of which Plaintiffs Complaint alleges Defendant Gahr's implication and involvement. In point of fact (as indicated by Gahr's Affidavit, Exhibit 1);

a) Biscay's Management contract under which Defendant Gahr performed his duties called for Biscay's

representative, in this case, Defendant Gahr, to perform tasks that were exclusively administrative in nature;

b) Defendant Gahr in no way involved himself with the sale for private placement of securities of Chill Tech Industries, Inc., or, for that matter, any other securities during the course of his entire life, either at that time, before, or after the time in question. Nor has Defendant Gahr at any time before, or after, the time in question ever raised capital for Chill Tech, or an other company.

c) With regard to artifices or devices used to promote the sale of Chill Tech common stock, again contrary to the allegations of Plaintiff's staff, each and eve press release was approved by and initialed by the Board of Directors of Chill Tech; and Defendant Gahr had absolutely no authority, without specific Board a royal, to prepare and disseminate said press releases, as is alleged; or to approve them when they were prepared by third parties.

d) The most prominent of the third parties was one Bruce Gorcyca A/K/A "Tony DiMarco" whose activities originally attracted the attention of Plaintiff's staff attorneys (See Exhibit 2) because he was a convicted stock swindler. In point of fact, "DiMarco" had been hired by the Board of Directors of Chill Tech, not Defendant Gahr, as has been alleged by Plaintiff's counsel. Gorcyca, using the nom de plume of Tony DiMarco convinced the Chill Tech Board that his services were needed as a legitimate Chill Tech stock promoter.

Under this guise, he in reality fashioned and issued false and misleading press releases heralding the Company's accomplishments. Gorcyca issued these "releases" himself, not under the company name, and without the authorization or knowledge of the Company. Gorcyca also, apparently unbeknownst to the entire Chill Tech management and executives of the corporation, and absolutely unknown to Defendant Gahr, sent out emails on behalf of the Company which were at complete variance with reality, and were entirely a fabrication of Gorcyca who was seeking to arouse interest and enthusiasm for the Company's stock; and thus cause an appreciation in Chill Tech's common stock trading price.

Neither Defendant Gahr nor, for that matter, Chill Tech's Board, were cognizant of Gorcyca's latter activities in the email regard. Nonetheless, in another profound fraud upon this Honorable Court, Plaintiff's counsel identified Respondent Gahr as "the source" of these activities; and alleged that Defendant Gahr, "drafted, approved, in fact, and/or reviewed such statements prior to their issuance," when Plaintiff's counsel knew full well, from the SEC public announcement of its investigation of Gorcyca by the Plaintiff SEC, that Gorcyca/DiMarco had concocted the entire fraudulent scheme, as he had apparently done many times before. (See Exhibit 2, ie. the prior SEC Enforcement Release on Gorcyca as reported in Bloomberg.).

3. At the core of Plaintiff's completely unfounded claims is that "Defendant Gahr and/or Chill Tech" (or in some instances Plaintiff's counsel employed the collective term "Defendants") to improperly inculpate

Defendant Gahr as the party "in charge of the day-to-day operations of Chill Tech." As such, the Complaint goes on to improperly allege, without even a scintilla of a foundation, that "false statements disseminated by the "Defendants" i.e. Chill Tech and Gahr) "impacted the market for Chill Tech Stock. " Again without even a shred of evidence to the effect that Defendant Gahr had involvement of any kind with any press releases (which incidentally were in each specifically approved, not by Defendant Gahr, but by Chill Tech's Board).

The Plaintiff's staff attorney Guevara has perpetrated this fabrication on this Honorable Court in order to "bootstrap" an alleged illegality against Defendant Gahr for purportedly employing:

these devices, schemes or artifices to defraud, making untrue statements of material fact or the omit to state a material- in in circumstances under which they were made, not misleading and to engage in acts, practices or causes of business ... which operates as a fraud in connection with these transactions, acts practices and courses of business described (falsely) in the Complaint, each of the Defendants' used interstate commerce to effect these alleged frauds on the investing public, apparently, as Plaintiffs twisted logic goes, 'Gahr, who ran Chill Tech pursuant to a management agreement, was responsible for all of the above statements.

The management contract in hardly establishes Defendant Gahr as this "pope of all publicity" at Chill Tech, particularly so if his true function -- not as COO as Plaintiff alleged -- is accurately and truthfully portrayed to this Honorable Court.

4. Beyond the alleged frauds having previously to deal with the Bruce Gorcyca A/K/A Anthony DiMarco situation involving phony faxes and concocted emails etc. and flawed press releases, which he (DiMarco), not Chill Tech, issued. Going further to explore the root of the false and misleading dissemination of information alleged by the Company itself, there is yet another question which is a further extension of the fraud perpetrated by Plaintiffs staff on this Court. This one has to do with whether or not the Chill Tech can itself is, as is alleged,

not 'environmentally friendly,' since the product contained Freon, a substance banned because of environmental concerns under international treaty since 1996... [This is] a fact which the Company admitted in a May 3, 2000, press release but failed to disclose in any of its prior press releases, including those issued on September 9 and November 6, 1998,

or so the Plaintiff's staff represented to the Court and, by this deception, relied upon it in its Court Presentation in yet another of Plaintiff's misleading and deceptive pleadings.

In a myriad of documents to this effect made available to the Plaintiffs staff in the course of its horribly flawed investigation of Chill Tech (See Exhibit 3), where it has been demonstratively shown that throughout the Will-bis relationship with Chill Tech that the Willbes company misled at the outset, and continued to mislead Chill Tech, that its technology was EPA "approvable," as devoid of any of the proscribed Freon. The manufacturer led Chill Tech to believe that the FDA was in the process of reviewing and approving the can

as environmentally acceptable. Only after Defendant Gahr himself became suspicious by reason of the delay at EPA and because the owner of the technology, was under investigation by the Korean SEC, did Defendant Gahr hire an independent laboratory to make its own evaluation of Will-bis. (See, once again, Defendant Gahr's Affidavit, Exhibit 1.)

As a result of Defendant Gahr's concerns about the Company, he (Gahr) commissioned an investigation by an independent testing facility, called the Axys Group, to perform an independent analysis of the self -chilling can technology, specifically its environmental safety (Exhibit 4), the results of which were all provided to the Plaintiff's staff in the course of its investigation. (See Exhibits 5 and 7.) This independent analysis revealed that Will-bis had misled the Chill Tech Company, and, as such, relying on the same, the previous Chill Tech press releases issued by the Company's Board were likewise inadvertently flawed. Once this came to light a curative press release disclosing that fact was promptly released by the Company.

5. Penultimately, in the hierarchy of these outrageous frauds and patent misrepresentations visited upon this Honorable Court by the Plaintiffs Counsel is the issue of the alleged "profits" experienced by Defendant Gahr from his stock trading etc. in Chill Tech securities: these outrageous, outlandish and totally apocryphal and unfounded claims made by the Plaintiffs Counsel's fraudulent misrepresentations to this Honorable Court are as follows:

a. "While Gahr was disseminating the false press releases, he personally sold 1,056,500 shares of Chill Tech common stock for profits of at least $278,738." (Complaint §4.)

b. "From January through December 1999, Gahr sold at least 1,056,500 shares of Chill Tech common stock at prices between $1.09 and .04 per share through Canadian and U.S. brokerage accounts in his and Biscay's names." (Complaint §20.)

c. "On four occasions Gahr sold stock on the date of, or one day after, the issuance of a false press release by Chill Tech." (Complaint §22.)

d. "Gahr realized a profit of at least $275,738 through these sales." (Complaint §23.)

e. "By reason of the foregoing, Defendant Gahr violated §17(a)(1) of the Securities Act and violating §5(a) and 5(c) of the Securities Act, when no registration statement was in effect." (Complaint §35.)

6. In addition to the foregoing, Plaintiff's Counsel has alleged that Defendant Gahr violated Sections 5(a) and 5(c) of the Securities Act [15U.S.C. §77e(a) and 77e(c)]. (Complaint §36.)

In truth, and yet again contrary to the false and fraudulent misrepresentations of the Plaintiff's staff, neither Biscay Management and Consulting Ltd. nor Defendant Gahr sold any unregistered securities of Chill Tech Industries, Inc., since Chill Tech never issued any shares to Biscay or Defendant Gahr. The Plaintiff has utilized this falsehood, among others, as

the mechanism to propel the financial sanctions against Defendant Gahr.

In reality, any of the Chill Tech securities that Defendant Gahr or Biscay Management acquired in certificate form, and subsequently sold into the marketplace, came from this issuance by Interactive to individuals other than Defendant Gahr and Biscay. Any certificates which were sold by Defendant Gahr or Biscay were done so through accredited brokerage firms, who confirmed with the company's transfer agent that the certificates were in good standing, determining that there was no restrictive legend, stop orders or any other encumbrances on free transferability of said certificates.

Further, on April 22, 1999, Biscay entered into a stock purchase agreement under which Biscay purchased one hundred and seventy-five thousand (175,000) shares of unregistered Chill Tech Industries, Inc. securities from one Edwin Devlin. The SEC has alleged that in connection with this transaction, Defendant Gahr sold certain restricted, unregistered stock (certificates numbered: #133, #134, #135, and #163). In fact, Defendant Gahr never sold this stock, and still has these certificates in his possession, as evidenced by the attached copies of the certificates. (Exhibit 6.) The Company never sold stock to Defendant Gahr. The stock purchased by him was solely from private individuals and no profit whatsoever was ever realized by Defendant Gahr when he eventually sold these free trading shares. Quite to the contrary, the cost incurred by Defendant Gahr in acquiring the stock caused him to sustain a loss of $0.13 per share.

7. Lastly, and perhaps at the zenith of the abuse by Plaintiff's staff of this unrepresented and unsuspecting layman and its affront to this Honorable Court by its pattern of misrepresentation and misinformation bordering on a clear case, prosecutorial misconduct and outright fraudulent proffers lies in Exhibits 7, S, 9, 10 to this pleading, as well as the last page of Exhibit 6. These documents comprise two transmittals from Defendant Gahr to SEC staff citing chapter and verse of the myriad misrepresentations of fact and evidence presented against and earnestly seeking to clarify and correct the multitude of most significant and profound inaccuracies complained of in Defendant's instant pleading.

Had there been any doubt that this prosecutorial misconduct was devoid of malicious intent and simply attributable to wholly inept and slovenly investigative work by the Plaintiff's incompetent staff it is herewith entirely dispelled with almost absolute certainty.

Defendant Gahr most eloquently and profoundly stated his real plight Exhibit 11:

Therefore, I contend that had the proper research been done by the staff of the Central Regional Office to verify the origin of securities bought and sold by Biscay or myself, your office would have realized that neither Biscay nor I personally have sold any unregistered securities of Chill Tech Industries, Inc. Proper documentation to verify that neither Biscay nor I sold `144 restricted stock' (as your office contends) is available outside of simply doing an 'EDGAR search' which you indicted was the only research you had undertaken-I find this most disconcerting, as the

Central Regional Office was supplied with voluminous amounts of documentation,

LEGAL ARGUMENT

I. OVERVIEW

In addressing the Default Judgment aspects of this case, and setting aside for the moment the flagrant misrepresentations either known to the Plaintiff's attorneys to their submissions to the Court or which should have been known to the Plaintiffs counsel in its representations to this Honorable Court, so egregious as to constitute a fraud upon this Court, we will first deal with the legal issues of setting aside the Default Judgment.

In a recent treatment of the subject by the Ninth Circuit it is clear that defaults, and default judgments, are generally disfavored by the court, and are appropriate only in extreme circumstances. TCI Group Life Insurance Plan v. Knoebber, 244 F.3d 691 (9th Cir. 2001). Equity favors resolution on the merits, and when considering default, in the case of a defendant not represented by counsel, the court's discretion to set aside the default is especially broad. Cripps v. Life Insurance Co. of North America, 980 F. 2d 1261 (9th Cir. 1992). The Ninth Circuit in Cripps holds, by analogy, that defaults against pro se litigants should be held to a less rigorous standard than when the defaulting party is represented by counsel. Likewise, the Seventh Circuit has held this more liberal policy is particularly applicable when the moving party is a foreign national. Bieganek v. Taylor, 801 F.2d 879 (7th Cir. 1986). Further, Courts are extremely reluctant

to uphold default judgments where substantial sums of money are involved, in this case, $507,818 plus interest.

Clearly, the logic of these holdings carries over to the instant Default Judgment setting, and equity demands that the default judgment against Defendant Gahr be set aside and the case be allowed to proceed on its merits.

In TCI Group the Court dealt specifically with default judgments, holding that:

Where there has been a no merits decision, appropriate exercise of district court discretion under Rule 60(b) requires that the finality interest should give way fairly readily to further the compelling interest and reaching the merits of the dispute. (Emphasis in original.) (Group at 696.)

Additionally, the 9th Circuit in Mendoza v. Wright Vineyard Management, 738 F.2d 941, an action where the plaintiffs had sought and secured a summary judgment against the defendants, stated:

Where timely relief is sought from a default-and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the default so that cases may be decided on their merits." (Mendoza at 946, citing Schwab v. Bullock's Inc., 508 F.2d 353, 355 [9th Cir. 1974] [quoting 7 J. Moore, Moore's Federal Practice paragraph symbol 60.19, at 232-33].)

The Mendoza court, citing a myriad of Ninth Circuit cases, added that:

The district court did not err in setting aside the defaults of the defendants... 'Absent an abuse of discretion, there is no error in setting aside a default where the judge finds good cause to do so.' Curry v. Jensen, 523 F.2d 387, 388 (9th Cir. 1975)...A decision on a motion to set aside a default is not an abuse of discretion unless the court is `clearly wrong' in its determination of good cause. (Mendoza at 945-6, citing Provident Security Life Insurance Co. v Gorsuch, 323 F.2d 839, 842 [9th Cir. 1963].)

II. STANDARD OF REVIEW

There is a well-established three-prong standard to be utilized in determining whether a default or default judgment should be set aside, which has been embraced by the Ninth Circuit. The basic standard enunciated by the Ninth Circuit eminates from the case of Falk v. Allen, 739 F.2d 461 (9th Cir. 1984). The three elements of the test are:

(1) whether the plaintiff would be prejudiced by setting aside the default;

(2) whether the defendant has a meritorious defense; and

(3) whether the defendant's culpable conduct led to the default.

III. PARADIGM FOR RELIEF

The defendant Lee E. Gahr clearly meets this standard in the instant case.

A. The Plaintiff will not be rejudiced b setting aside the Default.

This litigation involves the problematic actions of an overzealous staff of a federal agency victimizing the defendant, an unrepresented, unsophisticated foreign national, who was clearly overwhelmed by the turn of events of an SEC investigation. Any financial cost to the Federal government is minimal in comparison to the fines, levies, and costs to the Defendant in both financial and reputation losses should the Plaintiff be allowed to continue to prevail.

B. The Defendant Has a Most Meritorious Defense.

As is demonstrated in clarion terms in the preceding factual portion of this Motion, a galaxy of distortions in the Plaintiff's representations to this Honorable Court present a plethora of available defenses which can now be relied upon by Defendant in presenting the requisite showing of a "Meritorious Defense in that Defendant:

1. Gahr was never a "control" person in any real sense, a principal in a management-consulting firm called Biscay Management & Consulting, Ltd.

2. Biscay had a management contract with Chill Tech Industries, Inc. doing ADMINISTRATION.

3. Gahr never had the responsibility to advance the sale of Chill Tech stock. Selling Chill Tech stock was the responsibility of Bruce Gorcyca a/k/a (Tony DiMarco) who was contracted by Chill Tech's Board with that function.

4. Gorcyca was hired by Chill Tech's Board, not by Gahr.

5. All irregular email and false and misleading press releases were put out by Gorcyca, not Gahr.

6. All irregular emails were put out by this convicted crook Gorcyca, unbeknownst to Gahr and the Board.

7. The Korean can company misrepresented to Gahr and to the Chill Tech Board that the cans were Freon Free, AND getting EPA approval; and only through Gahr's intervention and authorizations of INDEPENDENT TESTING did he determine that the Koreans were misleading Chill Tech. Once this was learned, the Board immediately disclosed it in a press release.

8. Gahr did not take Chill Tech stock. What he had and sold was acquired through private transactions and in payment for past indebtedness.

9. The "profits " and finances alleged are apocryphal and entirely without foundation or support of any kind.

C. Defendant Lee E. Gahr Seeks Relief which is "Timely Sought."

Any motion for relief under the Federal Rules of Civil Procedure 60(b) must be made within one year and must be within "a reasonable time." In the instant case wherein the Plaintiff's staff exercised some legal legerdemain upon an unsuspecting, unrepresented, and inexperienced foreign national, Defendant Gahr is seeking relief within one year after the default

Judgment and, under these unusual circumstances, is clearly doing so within a reasonable time.

IV. EQUITY DEMANDS THE DEFAULT JUDGMENT BE SET ASIDE

A. Defendant Gahr is a Foreign National and was Not Represented.

In a closely parallel Seventh Circuit case, Bieganek v. Taylor, 801 F. 2d 879 (7th Cir. 1986) (noted above), involving a default judgment predicated upon claims . which were asserted under the Commodity Exchange Act, inter alia, aligning defendant's fraudulent investment conduct against a British citizen, the Court on appeal set aside the default upon a showing that: 1) the defendant asserted meritorious defenses; 2) there was an absence of defendant's willful defiance; and 3) a great unfairness could result were the judgment not to be set aside.

While these enunciated shibboleths' are extant in the present matter before this Honorable Court, additionally Defendant Gahr's situation is even more meritorious in that he was and is entirely unfamiliar with any SEC proceedings and, as was the moving party in Cripps, was unrepresented by legal counsel throughout.

B. A Substantial Sum of Mope is Involved

Courts have historically been reluctant to uphold default judgments where substantial amounts of money are involved, and make every effort to avoid determining matters involving large sums through

default if it can reasonably be avoided. (Wright and Miller, Federal Practice and Procedure, §2681. Not only is a substantial sum of money involved -- $507,818 plus interest -- but Defendant Gahr faces financial ruin as a result of thus default judgment entered against This fact alone militates strongly in favor of setting aside the default, in order to allow this Honorable Court to hear the case on its actual merits.

C. Actions of Plaintiff's Counsel are Tantamount to "Fraud on the Court"

The landmark case in this area of Rule 60(b) powers of a Court to set aside a judgment for "fraud on the Court" dealt with the contrivances and misconduct on the part of an opposing lawyers, just as we have not so extravagantly alleged in the instant matter. Hazel-Atlas Grass Company v. Hartford Empire Company, 64 S . Ct. 997, 322 U.S. 238, 88 L. Ed. 1250 (1944).

Speaking for the Supreme Court, Justice Black held that the judgment must be vacated by reason of the attorneys' improper conduct, which constituted the fraud upon the Court. This holding has stood the test of time, and states that:

Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possible to have been guilty of perjure. Here ... we find a deliberately planned and carefully executed scheme to defraud ... the Circuit Court of Appeals. (Hazel-Atlas, 64 S . Ct. at 1001, 32 U.S. at 245.)

Here the Court pointed out that the case did not concern only private parties and that there were "issues of great moment to the public."

[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the goad order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice, be, not so impotent that they must always be mute and helpless victims of deception and fraud. [Ibid. Emphasis added-]

The Court determined that it need not decide to what extent the conduct had impressed the judges who voted to uphold the patent nor was it even relevant whether the statements were true (which in the Gahr situation they are). The presence of a fraud on the Court alone was sufficient to set aside the judgment.

Counsel's research indicates that almost all of the principles that govern a claim of "fraud on the court" are derivable from the Hazel-Atlas case. Simply stated in its boldest terms, the power exists in every court. Accordingly, if it is found in the instant matter that there was a "fraud on the court," which would seem to be indicated in clarion terms by the myriad instances of misrepresentation recited in this pleading, and the exhibits thereto, the Supreme Court has stated in unequivocal terms that the judgment should be vacated

and the offending party (in this case the U.S. government through the offices of the Securities and Exchange Commission) must be denied ALL relief. Root Ref. Co. v. Universal Oil Prods. Co., 169 F.2d 514 (3d Cir. 1948), cert. denied, 69 S.Ct. 481, 335 U.S. 912, 93 L.Ed. 444.

Finally, as regards the issue of the passage of time in bringing this action before this Honorable Court, it has been held, in reliance on a Ninth Circuit case, Valencio v. Boise Cascade Corp., 80 D.C. Cal. 1978, F.R.D. 626, 640, affirmed 645 F2d 699 (9th Cir. 1981). Further, it has likewise been held that there can be no bar to the consideration of such action predicated on the doctrine of laches, predicated on the Hazel-Atlas holding, and followed by a number of lower Courts including the Ninth Circuit. Toscano v. Commissioner of Internal Revenue, 441 F.2d 930 (9th Cir. 1971).

CONCLUSION

The Default Judgment in this case should be set aside, and Defendant Lee E. Gahr, now able to afford the services of legal counsel represented by the undersigned, should he provided with the opportunity to file an answer in this case.

ROWE & HALES, LLP
/s/
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(775) 782-8141

and

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/s/
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CERTIFICATE OF MAILING

I hereby certify that I am an employee of ROWE & HALES, and that on July 18, 2002, I served the MOTION TO SET ASIDE DEFAULT on the following individual, by placing a true copy thereof enclosed in a sealed envelope, with first class postage prepaid thereon in the United States Post Office Mail addressed as follows:

Mr. Andres R. Guevara
U.S. Securities and Exchange Commission
Central Regional Office
1801 California Street, Suite 4800
Denver, CO 80202-2648

The envelope addressed as above will be deposited today with the United States Postal Service in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 18, 2002, in Douglas County, Nevada

/s/
SONYA HENNING

EXHIBITS

TABLE OF CONTENTS

1. Affidavit of Lee E. Gahr

Affidavit Exhibits:

1) April 23, 1998 letter from Lee E. Gahr to Edwin Devlin, President, Elk City Mining.

2) Chill Tech press release regarding "Arctic Can".

3) December 8, 1998 Chill Tech Board of Directors Meeting Agenda.

4) December 10, 1998 letter from Lee E. Gahr to Dr. Ian Woods, President, Chill Tech.

2. July 16, 1999 Bloomber News article.

3. January 15, 2000 letter from Young Woo Han, Managing Director, Will-bes & Co., Ltd. to Gary J. Knapp, Chill Tech.

4. February 17, 2000 Axys Analytical Services Report.

5. June 26, 2000 letter from Lee E. Gahr to Michael R. MacPhail and Andres R. Guevara, SEC.

6. Copies of SEC Form D and Chill Tech stock certificates, Nos. 133, 134, 135, and 163.

7. June 26, 2000 letter from Lee E. Gahr to Michael

R. MacPhail and Andres R. Guevara, SEC.

8. November 3, 2000 letter from Lee E. Gahr to Andres R. Guevara, Katherine S. Addleman, and Michael R. MacPhail, SEC.

9. November 29, 2000 letter from Lee E. Gahr to Katherine S. Addleman, SEC.

10. December 12, 2000 letter from Lee E. Gahr to Katherine S. Addleman, SEC.

11. June 26, 2000 letter from Lee E. Gahr to Michael MacPhail and Andres R. Guevara, SEC.

AFFIDAVIT of LEE E. GAHR

LEE E. GAHR, BEING DULY SWORN, DEPOSETH AND SAYETH:

1. I have never raised money for any company in my life, neither before my experience with Chill Tech or since that time.

2. I have always been relegated to doing administrative type tasks, doing the "leg work" on deals, which I am competent to do and which have done for a number of companies before I became involved with Elk City Mining, Inc. (later called Chill Tech).

3. I got involved in the Chill Tech situation since I was owed something like 145K for consulting services by The Dubai Company, that couldn't pay me so, one of their shareholders gave me an equivalent amount of stock in Elk City Mining. (See Exhibit 1.)

4. So, since Elk City Mining had no assets, someone connected with it suggested putting this self chilling can into the Company around September 1998, to try to make something of what was believed to be a most promising technology.

5. I had helped them with the merger and they asked me to administratively manage the Company.
6. Eventually they transferred it into a company called Chill Tech Industries, Inc (hereinafter referred to as "Chill Tech") which had a trading symbol of CHIL and had four directors:

1. Ian Woods -- Surgeon

2. Henk Offers - Insurance
3. Ken Laterit - Construction
4. Gary Knapp -- Salt Lake City - Retired Banker

7. These Directors said something to the effect of: "Manage it for us from an administrative standpoint"; which I did under a management consulting agreement with a company I controlled called Biscay Management & Consulting Ltd.

8. Eventually Chill Tech took over from this Korean company on a license agreement on this can chilling technology more fully described in Exhibit 2 to this affidavit, which was the press release describing the evolution of the so-called "ARCTIC Can" involvement. I obviously didn't have either the experience or know how to raise money for a public company. So I began talking to people with stocks and bonds experience and background for advice.

9. At that point, Chill Tech had been trading for under $1.00. But when the announcement that it had taken this license from this Korean chill can company the bulletin board stock went over $2.00. I honestly don't know what caused this but I think it is mainly attributable to the Korean Community in Vancouver.

10. So, through one of the people I sought for advice, one George Malasak, (introduced to me by one Tim Hicksher). Malasak sets up meetings in New York City in November/December 1998. Malasak introduced me to a freelance writer Bruce Barrin. Malasak also hired Bruce Barrin to write an article on Chill Tech. Malasak introduced me to the brokerage firm H.M. Myerson. H.M. Myerson told me that they would only want to

deal with an "officer or director" (of such small companies), so I told that to Chill Tech's Board upon my return to Canada.

11. It should be remembered and as reflected in the Corporate minutes that all four directors had to sign off on all press releases. These minutes were all turned over to the SEC during their investigation of Chill Tech and prior to their filing a lawsuit against me and Chill Tech.

12. Once I reported the Myerson's position or preference, the Board offered me an invitation to become an officer of the Chill Tech Company. Two or three days later I wrote to the Board and declined the job. Thus I never became an officer of Chill Tech Company. Both the minutes of all Board meetings including those of the December 8, 1998, meeting (Exhibit 3 to this Affidavit) wherein I was offered the COO position and Exhibit 4, where I declined to accept any position in the Chill Tech Company. Both of these documents were produced for the Plaintiffs counsel, Andres Guevara, Esquire, and his attention was specifically invited to them by me, but he chose to ignore that fact.

13. Also, in seeking financial advice for the Board to deal with, I went to Toronto for discussions with Kott Beverages. There I met Tony DeMarco (his real name turned out to be Bruce Gorcyca. His organization was out of Florida called Globus Group. The Directors and officers of the Company signed not me} a four-month promotion contract with Globus. After 30 days the Board terminated the contract. Globus (Gorcyca) had come on in February '99 for 10k/15k per month plus

50,000 shares of Chill Tech stock. He, it turned out, produced all these phony faxes, press releases, e[illegible]ls, etc. (the latter not known to the Board or to me).

a. With regard to dealing with the Korean's can company, the Will-bes & Co. Ltd. of Seoul, Korea: Will-bes, the Korean company, owned the chill can technology.

b. The public company (Chill Tech) had rights to it under license.

c. Under Chill Tech deal, Will-bes had the obligation in the license agreement to get EPA approval in the U. S. which they assured us that it would be no problem.

d. Along those lines, I occasionally talked to EPA agents to determine how this approval was progressing.

e. Will-bes never satisfied whatever EPA wanted for a decision or approval.

14. So I (Gahr) hired an independent testing company, after waiting for 8 months to have it done by the Koreans. I hired an independent testing company to test the cans, because I was getting suspicious and first learned that, contrary to what had been told to me, that they were using freon. Accordingly, I immediately told the Board of this misrepresentation by the Korean can company in the late Spring of '99. The Company, viewing that Koreans were in breach of contract -- all of the documents the Koreans had previously provided had indicated the opposite -- and we announced the

cancellation of the contract -- since it was not "environmentally friendly", as the Koreans had previously represented.

15. With regard to my financial involvement at Chill Tech I have never been paid, so I sold some stock to reimburse myself for expenses I had paid for out of my own pocket.

16. Additionally, it should be noted that I was the only one who invested (@ $204k) in Chill Tech.

17. I was never issued Company stock as has been consistently alleged by the Plaintiffs Counsel to this Court.

18. Contrary to the specific affidavit of Andres R. Guevara, the SEC staff attorney with whom I dealt, in his fraudulent Declaration of August 15, 2001 to the Court:

a. I was never severed (a second time) nor received any application for Default Judgment, nor was I contacted by the Commission regarding the possibility of a Default Judgment being entered at the time it was. I erroneously assumed we were still in negotiations about my so-called trading profits (actually losses) and the corresponding fines and financial penalties.

b. Chill Tech (the Company) did issue a press release stating the presence of an "environmentally unfriendly substance" which would have been in violation of the agreement with, and guarantees and warranties made by the manufacturer the Korean company. At that time the Company terminated its

agreement with the manufacturer, Will-bes and Co., Ltd.

c. The closing price of Chill Tech stock may have been as high as $2.00 per share which I believe that that was prior to my engagement by the Company.

d. There is absolutely no correlation between the highest trading price of $2.00 and the release of promotional materials touting the development and sale of the "Arctic Can", as the price high was reached prior to the to the release of promotional materials.

e. I did submit a summary of my entire trading activity to another SEC lawyer, Ms. Alderman since during my telephone conversations with Mr. Guevara regarding a SEC proposed settlement, Mr. Guevara steadfastly refused to accept the notion that I had actually paid (either in cash or through services rendered) for the shares of the Company which I then subsequently sold. The summary detailed the prices by brokerage firm and my acquisition cost.

Number of shares purchased from private individual	800,000
Cost of shares purchase from private individual	$250,000
Cost per share	$0.3125
No. of shares received in lieu of payment for services	375,000
Cost of shares received in lieu of payment for services	$375,000
Cost per share	$0.467
Total:	
Number of shares:	1,230,200

Cost of shares:	$485, 785.59
Cost per shar:	$0.394

19. This cost per share contrasts radically with the declarations made by Mr. Guevara. Mr. Guevara has stated that "Gahr's costs basis is unknown due to the lack of cooperation of the Gahr" which is entirely incorrect, and another false and fraudulent representation to the court, as I have freely opened all of my trading accounts, detailed how I came to receive and subsequently sell my shares and at what prices. I can only surmise that Mr. Guevara chose not to accept my information due to the fact that it wholly contradicted his assumptions; and that, in reality, I lost monies rather than profited by the sales.

20. Mr. Guevara further states, "a reasonable cost basis is $0.06, which is equal to the closing price of Chill Tech stock following the company's admission that the Arctic Can product was not viable". This statement is ridiculous for two reasons, (a) that the company did not "admit" to anything, rather the company (more specifically myself) were the ones who discovered the irregularities, and (b) that a cost basis of $0.06 per share is unreasonable and has no financial basis in which to support such a claim.

21. The review of the IRS rates is a non-issue as the interest is based on profits that are non-existence in this case.

FURTHER, AFFIANT SAYETH NOT.

LEE E. GAHR

Dated: May , 2002

Subscribed and sworn to before me this day of , 2002.

Notary Public
My commission expires

BISCAY MANAGEMENT & CONSULTING LTD.

#518-1489 Marine Drive, West Vancouver, BC,
Canada V7V 1H8

23 April 1998

Mr. Edwin Devlin
President
Elk City Mining, Inc.
#3-1037 Marine Drive
North Vancouver, BC
Canada V7P 1S6

Re: Payment of Consulting Fee

Dear Mr. Devlin,

Further to our conversation regarding Biscay's April 20th invoice, I appreciate Elk City's current financing position and its inability to pay Biscay's consulting fees at this time.

Therefore, I will accept an offer by one of your shareholders to transfer free trading stock of Elk City Mining, Inc. to Biscay in lieu of a cash payment.

Therein, with transfer to Biscay Management & Consulting Ltd. of the three hundred seventy-five thousand (375,000) free trading shares of Elk City Mining, Inc., worth a discounted value of one hundred seventy-five thousand United States dollars (US

$175,000.00) all consulting fees and invoices issued to date are hereby considered paid in full.

I look forward to the challenges in the upcoming months and share your enthusiasm for the future of Elk City Mining, Inc.

Sincerely yours,
/s/
Lee Gahr
President
Biscay Management & Consulting Ltd.

Directors Copy

CHILL TECH INDUSTRIES, INC.

NEWS RELEASE

Review of Corporate Events

Carson Citym Nevada, Dec. 11, 1998. The Board of Directors of Chill Tech Industries Inc., wishes to present the following review of corporate events as an information service to its shareholders.

In September of 1998, Elk City Mining, Inc., desirous to obtain technological and proprietary rights held by BTI Holdings Ltd., entered into merger negotiations.

A successful merger and ratification vote by the shareholders of both companies resulted in the surviving corporation – Elk City Mining Inc., acquiring all rights and technologies formerly held by BTI Holdings Ltd. Further to the shareholders ratification, the company has changed its name to Chill Tech Industries, Inc. (symbol CHIL) which reflects the companies new direction and focus.

Chill Tech Industries, Inc. owns the technological and proprietary rights in North America for a self-chilling beverage container, marketed under the name "Arctic Can ®". The technology being used in the "Arctic Can ®" was developed by the Will-bes & Co., Ltd of Seoul, Korea.

The "Arctic Can ®" self-chilling beverage container is a technologically feasible, environmentally friendly and

economically competitive product. Components of the "Arctic Can ®" consist of a modified beverage container and a specially developed refrigerant which is based on the simple principles of evaporation and heat transfer.

Currently, all research and development have been completed and prototypes are being tested. Chill Tech Industries, Inc. plans on establishing the first full production line to manufacture the "Arctic Can ®" early in the second quarter of 1999.

For further information about the company please contact the Investor Relations Department at the following number:

CONTACT: Chill Tech Industries, Inc.
Investor Relations
1-888-931-9991

The above statements regarding the business of Chill Tech Industries, Inc. are not purely historical rather are forward-looking statement within the meaning of the private Securities Litigation Reform Act of 1995, including Chill Tech Industries, Inc. beliefs, expectations, hopes, or intentions regarding the future. All forward-looking statements are made as of the date hereof and are based on information available to Chill Tech Industries, Inc. as of such date. It is important to note that actual outcome and actual results could differ materially from those in such forward-looking statements. Factors that could cause actual results to differ materially include risky and uncertainties such as technological, legislative and marketplace changes.

Dr. Ian Woods

Mr. Ken Laderoute

Mr. Henke Offers

Mr. Gary Knapp

Meeting

Of the Board of Directors of Chill Tech Industries, Inc.
December 8, 1998
Time: 4:00 PM

Agenda

Agenda Items:

1) Amend a resolution from the September 8th 1998 meeting to reflect a two-year option granted to Peter Fentiman for 100,000 shares at .50¢ per share. Also amend that directors and employees may exercise only 25% of their option every six months from the granting date.

2) Bring directors up to date on the progress of the affairs of the company, name change, CUSIP#, promotional materials, promotion Toronto-LA, financing etc.

3) Discuss and ratify the terms and conditions of a proposed agreement with Rubicon Capital Corp.

4) Discuss the terms and conditions of the engagement of KPMG as auditors.

5) Discuss the terms and conditions of the engagement of Bill Aul as securities council for the company.

6) Resolve the re-issue Ed Devlin's 5 Million shares.

7) Resolve to issue 4 million shares to Nam-Kee Industries Ltd.

8) Resolve to issue 1 million shares to Draco Group of Companies

9) Resolve to accept rejection of Presidency and Directorship by Jay Lee

10) Other Matters that may come before the board.

11) Officer Lee Gahr appointment of Chief Operating Officer for Chill Tech Industries Inc.

Any other business

The following resolutions were offered

RESOLVED:

Five million ($5,000,000) restricted shares which were initially issued to "Mr. Ed. Devlin" are to be cancelled and reissued as follows:

(a) One million (1,000,000) restricted shares are to be issued to be to the Draco Group of Companies, with the issue date to be that of the original date 30 April 1998, and

(b) Four million (4,000,000) restricted shares are to be issued in the name of Nam-Kee Industries Ltd., a company who shall hold said shares on behalf of the former shareholders of BTI Holding Ltd., with said shares to be held in escrow subject to the performance of the "self-chilling" beverage device and the discretion of the Board of Directors, with the issue date to be that of the merger date of BTI Holdings Ltd. and Elk City Mining Inc.

Moved by Gary Knapp Offers, seconded by Ian Woods – Adopted

Other Business

(a) Mr. Gahr brought to the board's attention that while in New York he was informed that for him or anyone else to represent Chill Tech Industries Inc. in any capacity have to be an officer or director of the company. The board discussed the situation and all present agreed to appoint Mr. Gahr as an officer of the company in the capacity of Chief Operating Officer

(COO). A "Service Contract" shall be negotiated and offered to Mr. Gahr for his acceptance. Mr. Gahr may negotiate a contract directly with Board Memebers Woods and Laderoute.

(b) The board read and accepted a STATEMENT from Mr. Jay Lee renouncing his offered positions to act as President and/or Director of Chill Tech Industries Inc. The board acknowledged his personal commitments and wish to that Mr. Lee for his input.

(c) An additional document was presented to the board for consideration from Jay Lee titled AGREEMENT ON COMPENSATION (copy attached). The board read the document and unanimously rejected all points of the document. The board instructed Mr. Gahr the to negotiate a compensation package with Hay Lee for a period of time encompassing 01 January 1999 – 30 June 1999.

(d) Due to a potential or possibility of conflict of interest with the Company's transfer agent (Interstate Transfer) the board gave Mr. Gahr the authority to change our transfer agent at the earliest opportunity.

(e) Director Offers raised for discussion and moved that, a quorum of the Board of Directors must sixty to seventy-five percent (60-75%) of members present to constitute a proper meeting.

(f) Director Officers raised for discussion and moved that any major policy which the Draco Group of Companies or Biscay Management & Consulting Ltd. wishes to implement, excluding business normally covered under a "managerial responsibility", be

reviewed and rectified by the Board of Directors.

(g) Director Offers raised for discussion that the minutes of Directors meetings be forwarded to all members as soon as possible.

RESOLVED:

(1) That a quorum of the Board of Directors be set at sixty to seventy-five percent (60-75%) of members present to constitute a proper meeting.

(2) That any major policy which the Draco Group of Companies or Biscay Management & Consulting Ltd. wishes to implement, excluding business normally covered under a "managerial responsibility", be reviewed and ratified by the Board of Directors

Moved by Gary Knapp, seconded by Ian Woods – Adopted

With no further business to conduct, the meeting was adjourned 6:009pm, December 8, 1998.

Biscay Management & Consulting Ltd.

10 December 1998

Chill Tech Industries, Inc.
Dr. Ian woods
President
2533 North Carson Street
Suite 3835
Carson City, Nevada 89706

Re: Declining of COO Position

To the Board of Directors of Chill Tech Industries, Inc.

Dear Board Members,

While I appreciate and am flattered that the Board of Directors would offer me the position of Chief Operating Officer (COO), I am have to decline said offer.

I have reviewed my current position and believe that I would be in conflict should I accept an offer from Chill Tech for any type of directorship or that of an officer.

Be advised that I hope that I will continue to be of service to the Company via the current management agreement(s) in place with Draco Group of Companies / Biscay Management & Consulting Ltd.

Therein, I again would like to thank the Board for their offer but am hereby respectfully declining same.

Sincerely yours,

/s/
Lee Gahr
President
Biscay Management & Consulting Ltd.

Suite #602 1489 Marine Drive, West Vancouver, B.C.
Canada V7T 1B8
Tel: (604) 926-2222 Fax: (604) 926-2502
e-mail: biscay@axiom.net

Mr. Lee Gahr
1489-Marine Drive, Suite 602
West Vancouver, BC
Canada V7T 1B8

To: Mr. Michael R. MacPhail Fax: (303) 844-1010
Mr. Andrew R. Guevara

From: Mr. Lee Gahr Date: 26/06/00
Re: D-2151ARG Pages: 30 including cover

Mr. Lee Gahr
1489 Marine Drive, Suite 602
West Vancouver, BC
Canada
V7T 1B8

26 June 2000

VIA FACSIMILE (303) 844-1010
AND FEDERAL EXPRESS

Mr. Michael R. MacPhail
Mr. Andres R. Guevara
U.S. Securities and Exchange Commission
Central Regional Office
1801 California Street, Suite 4800
Denver, Colorado
80202-2648

Re: In the Matter of China Food & Beverage Co. et. al (D-2151)

Dear Mr. MacPhail & Mr. Guevara,

Pursuant to our conversation of this morning, June 26th 2000, and subsequent statements which you have made to me, I would like to respond to your letter of dune 16th, 2000 in which you present that the staff of the Central Regional Office intends to recommend certain complaints to the Commission. I would like to take this opportunity to respond to the proposed complaints.

Regarding:

(1) Alleged violations of Sections 5(a) and 5(c) of the Securities Act of 1933, "sate of unregistered CHILL TECH INDUSTRIES, INC. securities.

As per our conversation this morning, Mr. MacPhail indicated that the staff of the Central Regional Office is not aware of, nor did any research regarding any predecessor companies of Chill Tech Industries, Inc. (Chill Tech). Had such research been done, the staff may have found that the predecessor to Chill Tech was ELK CITY MINING, INC., whose predecessor was INTERACTIVE TERMINAL INC. (Interactive)

Such research would have revealed that h Interactive executed a Regulation "D" offering, accepted by the Washington D.C. office of the Securities and Exchange Commission (SEC) on February 13, 1998. (see attached eight pages stamped "received" Feb 13 1998 -- Was., D.C. section) Interactive submitted an amended Regulation "D" offering, accepted by the Washington D.C. office of the SEC on April 03 1998. (see attached eight pages stamped received Apr 03 1998 - Was., D.C. section)

Any of the Chill Tech securities that I or my company, Biscay Management & Consulting Ltd. (Biscay) acquired in certificate form and subsequently sold into the marketplace, came from this issuance by Interactive. Any certificates which were sold by myself or Biscay were done so through accredited brokerage firms, who confirmed with the Company's transfer agent that the certificates were in good standing, determining that there was no restrictive legend, stop

orders or any other encumbrances on said certificates.

On April 22nd 1999, Biscay, entered into a stock purchase agreement under which Biscay purchased one hundred and seventy-five thousand (175,000) shares of unregistered Chill Tech Industries, Inc. securities from Mr. Edwin Devlin. As of the date first written above, Biscay continues to hold all one hundred and seventy-five thousand (175,000) shares, certificates numbered: #133, #134, #135 and #163 and is so evidenced by the attached copies of the certificates. (see attached four pages of "copies" Chill Tech Industries, Inc. share certificates -- issued to Biscay Management & consulting Ltd. dated May 7, 1999) Said certificates are available for viewing upon request.

Contrary to your comments of earlier today, Chill Tech Industries, Inc. has not issued to myself, Lee Gahr, nor my company, Biscay Management & Consulting Ltd., any securities, restricted or otherwise.

Therefore, I contend that had the proper research been done by the staff of the Central Regional Office to verify the origin of securities bought and sold by Biscay or myself, your office would have realized that neither Biscay nor I personally have sold any unregistered securities of Chill Tech Industries, Inc. Proper documentation to verify that neither Biscay nor I sold "144 restricted stock" (as your office contends) is available outside of simply doing an "EDGAR search" which you indicated was the only research you had undertaken.

(2) Alleged violations of Section 10(b) of the Securities and Exchange Act and Rule 10b-5 "based on

false and misleading statements contained in numerous Chill Tech press releases, Chill Tech's Internet website, and Chill Tech promotional materials".

As per our conversation this morning, Mr. MacPhail indicated that the staff of the Central Regional Office was seemingly unaware of the fact that the majority of the information used in presenting earnings and sales projections, environmental safety, technology and testing of the "Arctic Can" was complied by the Will-bes & Co., Ltd. (Will-bes) of Seoul, South Korea. (As a pointof reference, Will-bes is the owner of the technology, both the can and refrigerant, which would have comprised the whole of the "Arctic Can") I find this most disconcerting, as the Central Regional Office was supplied with voluminous amounts of documentation, originating from Will-bes, regarding the cans technology, environmental safety, testing parameters plus earnings and sales projections.

Chill Tech was informed in early 2000 that Will-bes was under investigation by the Korean SEC, for issuing false and misleading information and product results. The Company undertook their own investigation by hiring Axys Group to perform an independent analysis of the self-chilling can. (see attached six pages marked "Compositional analysis -17 Feb 2000) This independent analysis revealed that Will-bes had misled the Company and as such an appropriate release was issued. Follow-up research by the staff of the Central Regional Office could be undertaken should the staff wish to contact their counterparts at the Korean Securities and Exchange Commission.

Axys Group is a highly respected, independent analyst who is fully accredited across North America and is used continuously by Universities, Municipalities and States, both in Canada and the United States.

Biscay was engaged by Chill Tech to help oversee the general daily office operations associated with Chill Tech. In the course of executing those duties, materials had been prepared for Chill Tech with information supplied to Chill Tech by. Will-bes. Any statements regarding the environmental safety, technological status and testing of the "Arctic Can" were supplied directly by Will-bes. This also included market research data, pricing schedules and sale projections. Both Will-bes & Co., Ltd. and reputable firms in Asia prepared the materials submitted by Will-bes.

Any other dissemination of information was prepared on behalf of the company by a variety of sources. Research materials regarding such have been forwarded to the staff of the Central Regional Office for review. Any final decisions) for any release of information is the responsibility of Chill Tech.

In conclusion, I would submit that your recommendations be dismissed as:

Under allegation one: Neither Biscay Management & Consulting Ltd. nor I sold any unregistered securities of Chill Tech Industries, Inc.

Under allegation two: Promotional materials or other product information relating the "Arctic Can" were supplied by Will-bes & Co., Ltd. Chill Tech Industries, Inc. had a contractual obligation to depend

upon the claims and representations of the Will-bes company. News dissemination was issued by Chill Tech based on certain material facts available at the time and as such is the sole responsibility of the Company.

I trust that this clarifies my position regarding these allegations. Should you require further information I am at your disposal.

Sincerely, Lee Gahr

Copies attached:
eight pages form D - date stamped Feb 13 1998
eight pages form D - date stamped Apr 03 1998
four pages chill Tech Industries certificates #133, #134, #135, #163
six pages compositional analysis

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM D
NOTICE OF SALE OF SECURITIES PURSUANT TO REGULATION D SECTOIN 4(6), AND/OR UNIFORM LIMITED OFFERING EXEMPTION

Name of Offering (☐ check if this is an amendment and name has changed, and indicate change.)
Interactive Terminals, Inc.

Filing Under (Check box(es) that apply): ☒ Rule 504 ☐ Rule 505 ☐ Rule 506 ☐ Section 4(6) ☐ ULOE

Type of Filing: ☒ New Filing ☐ Amendment

A. BASIC IDENTIFICATION DATA

1. Enter the information requested about the issuer

Name of Issuer (☐ check if this is an amendment and name has changed, and indicate change.)
Interactive Terminals, Inc.

Address of Executive Offices
(Number and Street, City, State, Zip Code)
10550 SW Allen Blvd.#100, Beaverton, OR 97005
Telephone Number (Including Area Code)
(503) 641-8337

Address if Principal Business Operations
(Number and Street, City, State, Zip Code)
Telephone Number (Including Area Code)

(if different from Executive Offices)

Brief Description of Business

To acquire a fuel management systems manufacturing and distributing company.

Type of Business Organization

☒ corporation ☐ limited partnership, already formed
☐business trust ☐ limited partnership, to be formed
☐ other (please specify):

Actual or Estimated Date of Incorporation or Organization: Month Year

11 89 ☒ Actual ☐ Estimated

Jurisdiction of Incorporation or Organization: (Enter two-letter U.S. Postal Service abbreviation for State: NV CN for Canada: FN for other foreign jurisdiction.

GENERAL INSTRUCTIONS

Who Must File: All issuers making an offering of securities in reliance on an exemption under Regulation D or Section 4(6), 17 CFR 230.501 et seq. or 15 U.S.C. 77d(6).

When to File: A notice must be filed no later than 15 days after the first sale of securities in the offering. A notice is deemed filed with the U.S. Securities and Exchange Commission (SEC) on the earlier of the date it is received by the SEC at the address given below or, if received at that address after the date on which it is due, on the date it was mailed by United States registered or certified mail to that address.

Where to file: U.S. Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC

20549.

Copies Required: Five (5) copies of this notice must be filed with the SEC one of which must be manually signed. Any copies not manually signed must be photocopies of the manually signed copy or bear typed or printed signatures.

Information Required: A new filing must contain all information requested. Amendments need only report the name of the issuer and offering, any changes thereto, the information requested in Part C, and any material changes from the information previously supplied in Parts A and B. Part E and the Appendix need not be filed with the SEC.

Filing Fee: There is no federal filing fee.

State:
This notice shall be used to indicate reliance on the Uniform Limited Offering Exemption (ULOE) for sales of securities in those states that have adopted ULOE and that have adopted this form. Issuers relying on ULOE must file a separate notice with the Securities Administrator in each stat where sales are to be, or have been made. If a state requires the payment of a fee as a precondition to the claim for the exemption, a fee in the proper amount shall accompany this form. This notice shall be filed in the appropriate states in accordance with state law. The Appendix to the notice constitutes a part of this notice and must be completed.

ATTENTION

Failure to file notice in the appropriate states will not result in a loss of the federal exemption. Conversely, failure to file the appropriate federal notice will not result in a loss of an available state exemption unless such exemption is predicated on the filing of a federal notice.

2. Enter the information requested for the following:
   - Each promoter of the issuer, if the issuer has been organized within the past five years:
   - Each beneficial owner having the power to vote or dispose, or direct the vote or dispose of, 10% or more of a class of equity securities of the issuer:
   - Each executive officer and director of corporate general and managing partners of partnership issuers; and
   - Each general managing partner of partnership issuers.

Check Box(es) that Apply: ☐ Promoter
☐ Beneficial Owner ☒ Executive Officer ☒ Director
☐ General and/or Managing Partner

Full Name (Last name first, if individual)
Amdahl, Steve

Business or Residence Address
(Number and Street, City, State, Zip Code)
10550 SW Allen Blvd.#100, Beaverton, OR 97005

B. INFORMATION ABOUT OFFERING

	Yes	No
1. Has the issuer sold, or does the Issuer intend to sell, to non-accredited investors in this offering? Also answer in Appendix, Column 2, if filing under ULOE.	☒	☐
2. What is the minimum investment that will be accepted from any individual? $4,000		
3. Does the offering permit joint ownership of a single unit?	☒	☐

4. Enter the information request for each person who has been or will be paid or given, directly or indirectly, any commission or similar remuneration for solicitation of purchasers in connection with sales of securities in the offering. If a person to be listed is an associated person or agent of a broker or dealer registered with the SEC and/or with a state or states, list the name of the broker or dealer. If more than five (5) persons to be listed are associated persons of such a broker or dealer, you may set forth the information for that broker or dealer only.

Full Name (Last name first, if individual)
N/A

Business or Residence Address (Number and Street, City, State, Zip Code)

Name of Associated Bank or Dealer

States in Which Person Listed has Solicited or Intends to Solicit Purchasers

(Check "All States" or check individual States) ..... ☐ All States

[AL] [AK] [AZ] [AR] [CA] [CO] [CT] [DE] [DC] [FL] [GA] [HI] [ID] [IL] [IN] [IA] [KS] [KY] [LA] [ME] [MD] [MA] [MI] [MN] [MS] [MO] [MT] [NE] [NV] [NH] [NJ] [NM] [NY] [NC] [ND] [OH] [OK] [OR] [PA] [RI] [SC] [SD] [TN] [TX] [UT] [VT] [VA] [WA] [WV] [WI] [WY] [PR]

C. OFFERING PRICE, NUMBER OF INVESTORS, EXPENSES AND USE OF PROCEEDS

1. Enter the aggregate offering price of securities included in this offering and the total amount already sold. Enter "0" if answer is "none" or "zero." If the transaction is an exchange offering check this box ☐ and indicate in the columns below the amounts of the securities offered for exchange and already exchanged.

Type of Security	Aggregate Offering Price	Amount Already Sold
Debt	$ -0-	$ -0-
Equity	$100,000	$ -0-
☒Common ☐Preferred		
Convertible Securities (including warrants)	$ -0-	$ -0-
Partnership Interests	$ -0-	$ -0-
Other (Specify_____)	$ -0-	$ -0-
Total	$100,000	$ -0-

Answer also in Appendix, Column 3, if filing under ULOE

2. Enter the number of accredited and non-accredited investors who have purchased securities in this offering and the aggregate dollar amounts of their purchases. For offerings under Rule 504, indicate the number of persons who have purchased securities and the aggregate dollar amount of their purchases on the total lines. Enter "0" if answer is "none" or "zero."

	Number Investors	Aggregate Dollar Amount of Purchases
Accredited Investors.....	-0-	$ -0-
Non-accredited Investors.....	-0-	$ -0-
Total (for filings under Rule 504 only).....	-0-	$ -0-

Answer also in Appendix, Column 4, if filing under ULOE.

3. If this filin is for an offering under Rule 504 or 505, enter th information requested for all securities sold by the issuer to date, in offerings of the types indicated, in the twelve (12) months prior to the first sale of securities in this offering. Classify securities by type listed in Part C- Question 1.

Type of Offering	Type of Security	Dollar Amount Sold
Rule 505.....	-0-	$ -0-
Regulation A.....	-0-	$ -0-
Rule 504.....	-0-	$ -0-
Total.....	-0-	$ -0-

4. a. Furnish a statement of all expenses in connection with the issuance and distribution of the securities in this offering. Exclude amounts relating solely to

organization expenses of the issuer. The information may be given as subject to future contingencies. If the amount of an expenditure is not known, furnish and estimate and check the boxes to the left of the estimate.

Transfer Agent's Fees	☒	$ 2,500
Printing and Engraving Costs	☒	$ 750
Legal Fees	☒	$ 8,500
Accounting Fees	☒	$ 8,000
Engineering Fees	☐	$ -0-
Sales Commissions (specify finder's fees separately)	☐	$ -0-
Other Expenses (identify) Phone, fax and stationary	☐	$ 3,000
Total	☒	$ 22,750

b. Enter the difference between the aggregate offering price given in response to Part C – Question 1 and total expenses furnished in response to Part C – Question 4.a. This difference is the adjusted gross proceeds to the Issuer $77,250

5. Indicate below the amount of the adjusted gross proceeds to the issuer used or proposed to be used for each of the purposed shown. If the amount for any purpose is not known, furnish and estimate and check the box to the left of the estimate. The total of the payments listed must equal the adjusted gross proceeds to the issuer set forth in response to Part C – Question 4.b above.

	Payments to Officers Directors & Affiliates	Payments to Others
Salaries and Fees.....	☐$ -0-	☐$ -0-
Purchase of Real Estate.....	☐$ -0-	☐$ -0-
Purchase, rental or leasing and installation of machinery and equipment.....	☐$ -0-	☐$ -0-
Construction or leasing of plant buildings and facilities..	☐$ -0-	☐$ -0-
Acquisition of other business (including the value of securities involved in this offering that may be used in exchange for the assets of securities of another issuer pursuant to a merger	☐$ -0-	☐$ -0-
Repayment of indebtedness..	☐$ -0-	☐$ -0-
Working capital	☐$ -0-	☒$77,250
Other (specify): _____	☐$ -0-	☐$ -0-
_____	☐$ -0-	☐$ -0-
Column Totals.....	☐	☒$77,250
Total Payments Listed (column totals added).....		☒$77,250

D. FEDERAL SIGNATURE

The issuer has duly caused this notice to be signed by the undersigned duly authorized person. If this notice is filed under Rule 505, the following signature constitutes an undertaking by the issuer to furnish to the U.S. Securities and Exchange Commission, upon

written request of its staff, the information furnished by the issuer to any non-accredited investor pursuant to paragraph (b)(2) of Rule 502.

Issuer (Print or Type) Interactive Terminals, Inc.	Signature /s/	Date Feb. 12, 1998
Name of Signer (Print or Type) Steve Amdahl	Title of Signer (Print or Type) President/Secretary	

ATTENTION

Intentional misstatement or omissions of fact constitute federal criminal violations. (See 18 U.S.C. 1001.)

E. STATE SIGNATURE

1. Is any party described in 17 CFR 230.252(c), (d), (e) or (f) presently subject to any of the disqualification provisions of such rule? ..... Yes ☐ No ☒

See Appendix, Column 5, for state response.

2. The undersigned issuer hereby undertakes to furnish to any state administrator of any state in which this notice is filed, a notice on Form D (17 CFR 239.500) at such times as required by state law.

3. The undersigned issuer hereby undertakes to furnish to the state administrators, upon written request, information furnished by the issuer to offerees.

4. The undersigned issuer represents that the issuer is familiar with the conditions that must be satisfied to be entitled to the Uniform Limited Offering Exemption

(ULOE) of the state in which this notice is filed and understands that the issuer claiming the availability of this exemption has the burden of establishing that these conditions have been satisfied.

The issuer has read this notification and knows the contents to be true and has duly caused this notiee to be signed on its behalf by the undersigned duly authorized person.

Issuer (Print or Type) Interactive Terminals, Inc.	Signature /s/	Date Feb. 12, 1998
Name of Signer (Print or Type) Steve Amdahl	Title of Signer (Print or Type) President/Secretary	

APPENDIX

1	2		3	4				5	
	Intend to sell to non-accredited investors in State (Part B-Item 1)		Type of security and aggregate offering price offered in state (Part C-Item 1)	Type of investor and amount purchased in State (Part C-Item 2)				Disqualification under State ULOE (if yes, attach explanation of waiver granted) (Part E-Item 1)	
State	Yes	No		Number of Accredited Investors	Amount	Number of Non-Accredited Investors	Amount	Yes	No
AL									
AK									
AZ									

AR									
CA									
CO									
CT									
DE									
DC									
FL									
GA									
HI									
ID									
IL									
IN									
IA									
KS									
KY									
LA									
ME									
MD									
MA									

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM D
NOTICE OF SALE OF SECURITIES
PURSUANT TO REGULATION D
SECTOIN 4(6), AND/OR
UNIFORM LIMITED OFFERING EXEMPTION

Name of Offering (☐ check if this is an amendment and name has changed, and indicate change.)
Interactive Terminals, Inc.

Filing Under (Check box(es) that apply): ☒ Rule 504 ☐ Rule 505 ☐ Rule 506 ☐ Section 4(6) ☐ ULOE

Type of Filing: ☐ New Filing ☒ Amendment

A. BASIC IDENTIFICATION DATA

1. Enter the information requested about the issuer

Name of Issuer (☐ check if this is an amendment and name has changed, and indicate change.)
Interactive Terminals, Inc.

Address of Executive Offices
(Number and Street, City, State, Zip Code)
10550 SW Allen Blvd.#100, Beaverton, OR 97005
Telephone Number (Including Area Code)
(503) 641-8337

Address if Principal Business Operations
(Number and Street, City, State, Zip Code)
Telephone Number (Including Area Code)

(if different from Executive Offices)

Brief Description of Business

To acquire a fuel management systems manufacturing and distributing company.

Type of Business Organization

☒ corporation ☐ limited partnership, already formed

☐business trust ☐ limited partnership, to be formed

☐ other (please specify):

Actual or Estimated Date of Incorporation or Organization: Month Year

11 89 ☒ Actual ☐ Estimated

Jurisdiction of Incorporation or Organization: (Enter two-letter U.S. Postal Service abbreviation for State: NV CN for Canada: FN for other foreign jurisdiction.

GENERAL INSTRUCTIONS

Who Must File: All issuers making an offering of securities in reliance on an exemption under Regulation D or Section 4(6), 17 CFR 230.501 et seq. or 15 U.S.C. 77d(6).

When to File: A notice must be filed no later than 15 days after the first sale of securities in the offering. A notice is deemed filed with the U.S. Securities and Exchange Commission (SEC) on the earlier of the date it is received by the SEC at the address given below or, if received at that address after the date on which it is due, on the date it was mailed by United States registered or certified mail to that address.

Where to file: U.S. Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC

20549.

Copies Required: Five (5) copies of this notice must be filed with the SEC one of which must be manually signed. Any copies not manually signed must be photocopies of the manually signed copy or bear typed or printed signatures.

Information Required: A new filing must contain all information requested. Amendments need only report the name of the issuer and offering, any changes thereto, the information requested in Part C, and any material changes from the information previously supplied in Parts A and B. Part E and the Appendix need not be filed with the SEC.

Filing Fee: There is no federal filing fee.

State:
This notice shall be used to indicate reliance on the Uniform Limited Offering Exemption (ULOE) for sales of securities in those states that have adopted ULOE and that have adopted this form. Issuers relying on ULOE must file a separate notice with the Securities Administrator in each stat where sales are to be, or have been made. If a state requires the payment of a fee as a precondition to the claim for the exemption, a fee in the proper amount shall accompany this form. This notice shall be filed in the appropriate states in accordance with state law. The Appendix to the notice constitutes a part of this notice and must be completed.

ATTENTION

Failure to file notice in the appropriate states will not result in a loss of the federal exemption. Conversely, failure to file the appropriate federal notice will not result in a loss of an available state exemption unless such exemption is predicated on the filing of a federal notice.

2. Enter the information requested for the following:
   - Each promoter of the issuer, if the issuer has been organized within the past five years:
   - Each beneficial owner having the power to vote or dispose, or direct the vote or dispose of, 10% or more of a class of equity securities of the issuer:
   - Each executive officer and director of corporate general and managing partners of partnership issuers; and
   - Each general managing partner of partnership issuers.

Check Box(es) that Apply: ☐ Promoter
☐ Beneficial Owner ☒ Executive Officer ☒ Director
☐ General and/or Managing Partner

Full Name (Last name first, if individual)
Amdahl, Steve

Business or Residence Address
(Number and Street, City, State, Zip Code)
10550 SW Allen Blvd.#100, Beaverton, OR 97005

B. INFORMATION ABOUT OFFERING

	Yes	No
1. Has the issuer sold, or does the Issuer intend to sell, to non-accredited investors in this offering? Also answer in Appendix, Column 2, if filing under ULOE.	☒	☐
2. What is the minimum investment that will be accepted from any individual? $500		
	Yes	No
3. Does the offering permit joint ownership of a single unit?	☒	☐

4. Enter the information request for each person who has been or will be paid or given, directly or indirectly, any commission or similar remuneration for solicitation of purchasers in connection with sales of securities in the offering. If a person to be listed is an associated person or agent of a broker or dealer registered with the SEC and/or with a state or states, list the name of the broker or dealer. If more than five (5) persons to be listed are associated persons of such a broker or dealer, you may set forth the information for that broker or dealer only.

Full Name (Last name first, if individual)
N/A

Business or Residence Address (Number and Street, City, State, Zip Code)

Name of Associated Bank or Dealer

States in Which Person Listed has Solicited or Intends to Solicit Purchasers

(Check "All States" or check individual States) ..... ☐ All States

[AL] [AK] [AZ] [AR] [CA] [CO] [CT] [DE] [DC] [FL] [GA] [HI] [ID] [IL] [IN] [IA] [KS] [KY] [LA] [ME] [MD] [MA] [MI] [MN] [MS] [MO] [MT] [NE] [NV] [NH] [NJ] [NM] [NY] [NC] [ND] [OH] [OK] [OR] [PA] [RI] [SC] [SD] [TN] [TX] [UT] [VT] [VA] [WA] [WV] [WI] [WY] [PR]

C. OFFERING PRICE, NUMBER OF INVESTORS, EXPENSES AND USE OF PROCEEDS

1. Enter the aggregate offering price of securities included in this offering and the total amount already sold. Enter "0" if answer is "none" or "zero." If the transaction is an exchange offering check this box ☐ and indicate in the columns below the amounts of the securities offered for exchange and already exchanged.

Type of Security	Aggregate Offering Price	Amount Already Sold
Debt.....	$ -0-	$ -0-
Equity.....	$50,000	$ -0-
☒Common ☐Preferred		
Convertible Securities (including warrants).....	$ -0-	$ -0-
Partnership Interests.....	$ -0-	$ -0-
Other (Specify_____).....	$ -0-	$ -0-
Total.....	$50,000	$ -0-

Answer also in Appendix, Column 3, if filing under ULOE

2. Enter the number of accredited and non-accredited investors who have purchased securities in this offering and the aggregate dollar amounts of their purchases. For offerings under Rule 504, indicate the number of persons who have purchased securities and the aggregate dollar amount of their purchases on the total lines. Enter "0" if answer is "none" or "zero."

	Number Investors	Aggregate Dollar Amount of Purchases
Accredited Investors.....	-0-	$ -0-
Non-accredited Investors.....	-0-	$ -0-
Total (for filings under Rule 504 only).....	-0-	$ -0-

Answer also in Appendix, Column 4, if filing under ULOE.

3. If this filin is for an offering under Rule 504 or 505, enter th information requested for all securities sold by the issuer to date, in offerings of the types indicated, in the twelve (12) months prior to the first sale of securities in this offering. Classify securities by type listed in Part C- Question 1.

Type of Offering	Type of Security	Dollar Amount Sold
Rule 505.....	-0-	$ -0-
Regulation A.....	-0-	$ -0-
Rule 504.....	-0-	$ -0-
Total.....	-0-	$ -0-

4. a. Furnish a statement of all expenses in connection with the issuance and distribution of the securities in this offering. Exclude amounts relating solely to

organization expenses of the issuer. The information may be given as subject to future contingencies. If the amount of an expenditure is not known, furnish and estimate and check the boxes to the left of the estimate.

Transfer Agent's Fees	☒	$ 1,500
Printing and Engraving Costs.....	☒	$ 750
Legal Fees.....	☒	$ 4,500
Accounting Fees.....	☒	$ 4,000
Engineering Fees.....	☐	$ -0-
Sales Commissions (specify finder's fees separately).....	☐	$ -0-
Other Expenses (identify) Phone, fax and stationary.....	☐	$ 1,000
Total.....	☒	$ 11,750

b. Enter the difference between the aggregate offering price given in response to Part C – Question 1 and total expenses furnished in response to Part C – Question 4.a. This difference is the adjusted gross proceeds to the Issuer $38,250

5. Indicate below the amount of the adjusted gross proceeds to the issuer used or proposed to be used for each of the purposed shown. If the amount for any purpose is not known, furnish and estimate and check the box to the left of the estimate. The total of the payments listed must equal the adjusted gross proceeds to the issuer set forth in response to Part C – Question 4.b above.

	Payments to Officers Directors & Affiliates	Payments to Others
Salaries and Fees.....	☐$ -0-	☐$ -0-
Purchase of Real Estate.....	☐$ -0-	☐$ -0-
Purchase, rental or leasing and installation of machinery and equipment.....	☐$ -0-	☐$ -0-
Construction or leasing of plant buildings and facilities..	☐$ -0-	☐$ -0-
Acquisition of other business (including the value of securities involved in this offering that may be used in exchange for the assets of securities of another issuer pursuant to a merger	☐$ -0-	☐$ -0-
Repayment of indebtedness..	☐$ -0-	☐$ -0-
Working capital	☐$ -0-	☒$38,250
Other (specify): _____	☐$ -0-	☐$ -0-
_____	☐$ -0-	☐$ -0-
Column Totals.....	☐	☒$38,250
Total Payments Listed (column totals added).....		☒$38,250

D. FEDERAL SIGNATURE

The issuer has duly caused this notice to be signed by the undersigned duly authorized person. If this notice is filed under Rule 505, the following signature constitutes an undertaking by the issuer to furnish to the U.S. Securities and Exchange Commission, upon

written request of its staff, the information furnished by the issuer to any non-accredited investor pursuant to paragraph (b)(2) of Rule 502.

Issuer (Print or Type) Interactive Terminals, Inc.	Signature /s/	Date April 1, 1998
Name of Signer (Print or Type) Steve Amdahl	Title of Signer (Print or Type) President/Secretary	

ATTENTION

Intentional misstatement or omissions of fact constitute federal criminal violations. (See 18 U.S.C. 1001.)

E. STATE SIGNATURE

1. Is any party described in 17 CFR 230.252(c), (d), (e) or (f) presently subject to any of the disqualification provisions of such rule? ..... Yes ☐ No ☒

See Appendix, Column 5, for state response.

2. The undersigned issuer hereby undertakes to furnish to any state administrator of any state in which this notice is filed, a notice on Form D (17 CFR 239.500) at such times as required by state law.

3. The undersigned issuer hereby undertakes to furnish to the state administrators, upon written request, information furnished by the issuer to offerees.

4. The undersigned issuer represents that the issuer is familiar with the conditions that must be satisfied to be entitled to the Uniform Limited Offering Exemption

MI									
MN									
MS									
MO									
MT									
NE									
NV									
NH									
NM									
NY									
NC									
ND									
OH									
OK									
OR									
PA									
RI									
SC									
SD									

TN									
TX									
UT									
VT									
VA									
WA									
WV									
WI									
WI									
PR									

(ULOE) of the state in which this notice is filed and understands that the issuer claiming the availability of this exemption has the burden of establishing that these conditions have been satisfied.

The issuer has read this notification and knows the contents to be true and has duly caused this notice to be signed on its behalf by the undersigned duly authorized person.

Issuer (Print or Type) Interactive Terminals, Inc.	Signature /s/	Date April 1, 1998
Name of Signer (Print or Type) Steve Amdahl	Title of Signer (Print or Type) President/Secretary	

WI									
PR									

108a

Chill Tech Industries, Inc.

THIS CERTIFIES THAT BISCAY MANAGEMENT & CONSULTING LTD.

IS THE RECORD HOLDER OF *ONE HUNDRED THOUSAND*

— Shares of CHILL TECH INDUSTRIES, INC. Common Stock —

CHILL TECH INDUSTRIES, INC. CORPORATE Seal NEVADA

109a

BEST AVAILABLE COPY

APPENDIX

1	2		3	4				5	
	Intend to sell to non-accredited investors in State (Part B-Item 1)		Type of security and aggregate offering price offered in state (Part C-Item 1)	Type of investor and amount purchased in State (Part C-Item 2)				Disqualification under State ULOE (if yes, attach explanation of waiver granted) (Part E-Item 1)	
State	Yes	No		Number of Accredited Investors	Amount	Number of Non-Accredited Investors	Amount	Yes	No
AL									
AK									
AZ									

AR									
CA									
CO									
CT									
DE									
DC									
FL									
GA									
HI									
ID									
IL									
IN									
IA									
KS									
KY									
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NC									
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OH									
OK									
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SC									
SD									

TN									
TX									
UT									
VT									
VA									
WA									
WV									
WI									
WI									
PR									

NOT VALID UNLESS COUNTERSIGNED BY TRANSFER AGENT
AUTHORIZED UNDER THE LAWS OF THE STATE OF NEVADA

CUSIP NO. 16907N 10 1

Chill Tech Industries, Inc.

AUTHORIZED COMMON STOCK: TWENTY FIVE MILLION
PAR VALUE: $.001

THIS CERTIFIES THAT BISCAY MANAGEMENT & CONSULTING LTD.

IS THE RECORD HOLDER OF "TWENTY FIVE THOUSAND"

— Shares of CHILL TECH INDUSTRIES, INC. Common Stock —

transferable on the books of the Corporation in person or by duly authorized attorney upon surrender of this Certificate properly endorsed. This Certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

Witness the facsimile seal of the Corporation and the facsimile signatures of its duly authorized officers.

Dated: MAY 14 1999
Original Issue 6/30/99

CHILL TECH INDUSTRIES, INC. CORPORATE Seal NEVADA

SECRETARY

PRESIDENT

NOT VALID UNLESS COUNTERSIGNED BY TRANSFER AGENT

110a

No. 03-15879
D.C. No. CV-00-01088-KJD

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff - Appellee,

v.

LEE E. GAHR,
Defendant - Appellant.

Filed November 30, 2004

ORDER

Before: RYMER, TALLMAN, and BEA, Circuit Judges.

The Petition for Rehearing is DENIED.

Case No. CV-S-00-1088-KJD (RJJ)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

LEE E. GAHR
Defendant.

Filed March 12, 2003

ORDER

Presently, the Court has before it Defendant Gahr's ("Defendant") Motion to Set Aside Default (#16). Plaintiff filed a response in opposition (#19), to which Defendant replied (#21).

I. Background.

On September 5, 2000, the Government filed an enforcement action against Chill Tech Industries, Inc. and Defendant. In its complaint, the Government alleged violation of the registration and anti-fraud provisions of the federal securities laws. The complaint was based upon the public dissemination between September 1998 and May 2000 of false and misleading statements about "Chill Can," including statements about its products, business operations and projected revenue. The Government alleged that Defendant, who managed Chill Tech Industries, Inc. pursuant to a

management agreement, was liable for these false and misleading statements.

Defendant was personally served the summons and complaint on September 13, 2000. Memoralized in a letter slated October 3, 2000, Defendant apparently talked with the Government's counsel and sought a thirty-day extension for his response to the complaint, to which the Government consented. In a letter dated November 3, 2000, Defendant discussed the Government's proposed settlement offer and challenged the Government's allegations and facts. In a letter dated November 17, 2000, the Government acknowledged receipt of Defendant's letter and warned Defendant that the Government would commence default proceedings if he did not respond to the complaint. Ten days later, the Government advised Defendant that his failure to file a response in the instant litigation currently placed hire in default. The Government further advised Defendant that it intended to resolve the disputed factual issues in litigation but was willing to discuss alternative figures for disgorgement and civil penalties. Defendant responded to the Government's advisements in a letter dated November 29, 2000. As it pertained to the default judgment now at issue, Defendant stated in the letter that: "I appreciate your comments regarding filing a response with the District Court and shall engage council [sic] to do so as soon as possible. It was my understanding from attorney Guevara that I should not file during a possible settlement agreement though that appears to be incorrect."

On November 28, 2000, the Government requested an entry of default against Defendant. The Clerk of the

Court entered default on April 30, 2001. On August 16, 2001, the Government moved for the default judgment, which the Count entered on August 22, 2001. In a related case, the Securities and Exchange Commission issued it Order Instituting Proceedings ("OIP") on December 7, 2001, which Defendant was served on January 3, 2002. Essentially, the Division of Enforcement was seeking a penny stock bar against the Defendant based on the entry of default judgment. On January 14, 2002, Defendant's counsel entered his appearance and then later requested a lengthy extension of time to file an answer to the OIP, citing his unfamiliarity with the issues and his and Defendant's preexisting travel commitments. Defendant was subsequently granted an extension until March 25, 2002 to file his answer. However, Defendant did not file an answer on this date. On March 29, 2002, the Division moved for default judgment. Despite still not having filed an answer to the OIP, Defendant opposed the Division's motion, essentially asserting that he might file a motion with the federal district court within the next several weeks to set aside the default judgment. Defendant further argued that if he prevailed in the federal district court, the Division's present motion would be moot anti thus further delay would not prejudicial. On April 10, 2002, the Division's motion was granted because Defendant was found to be in default for failing to answer the OIP within the allotted time and good cause had not been established for an indefinite postponement.

On July 19, 2002, Defendant filed the instant motion to set aside the previously entered default judgment in this case. Defendant argues that he meets the standard for vacating a default judgment. The Government

refutes that argument.

II. Analysis.

Rule 55 states that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c). Rule 60(b), in turn, guides the balance between the overriding judicial goal of deciding cases correctly, on the basis of their legal and factual merits, with the interest of both litigants and the courts in the finality of judgment. See TCI Group Life Ins. Plan v. Knoebber, 244 Fad 691, 695 (9th Cir. 2001). As a general matter, Rule 60(b) is remedial in nature and must be liberally applied. See id. at 695-96. In applying the general terms of Rule 60(b) to default judgments, such judgments are appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits. See id. at 696. Thus, when a decision has not been on the merits, Rule 60(b) requires that the finality interests should give way fairly readily to further the competing interest in reaching the merits of a dispute. See id.

The three factors that govern the lifting of entries of default under Rule 55(c) also govern the vacating of a default judgment under Rule 60(b). See id. These factors are; (1) whether the defendant's culpable conduct led to the default; (2) whether the defendant has a meritorious defense; and (3) whether reopening the default judgment would prejudice the plaintiff. See id. The party seeking to vacate a default judgment bears the burden of demonstrating that these factors favor vacatur. See id. Even assuming that Defendant

has a meritorious defense, the Court finds that he has not met his burden as to the other two factors.

A. Culpable conduct.

"[A] defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and intentionally failed to answer." Alan Neuman Prods, Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988). "Intentional" in this context means more than an act or omission taken by an actor knowing what the likely consequence will be. See Knoebber, 244 F.3d at 697. Rather, "intentional" means "willful, deliberate, or evidence of bad faith" Id. (quoting Am. Alliance Ins. Co. v. Eagle Co,, 92 F.3d 57, 61 (2d Cir. 1996)).

Here, Defendant has failed to meet his burden that his conduct was not culpable. Defendant's conclusory claim of being a "naive," "inexperienced," pro se party is insufficient to carry his burden. Defendant states that he assumed that ongoing discussions would continue ad infinitum and that the Government never indicated that they were moving for default. The evidence, however, is to the contrary. In his November 29, 2000 correspondence with the Government, Defendant specifically acknowledged that he needed to file an answer in the instant case. In its letter of November 17 & 27, 2000, the Government notified Defendant that it would commence default proceedings if he did not file a response and that it was anticipating resolution of the issue through the litigation process. As further evidence of his culpability Defendant requested a thirty-day extension in late September or early October of 2000. See Benny v. Pipes, 799 F.2d 489, 494 (9th Cir. 1986) (finding that defendants' failure to answer the

complaint was culpable when defendants had first filed motions to extend their time to answer, indicating an ability to deal with legal requirements). Finally, Defendant continues to miss deadlines after seeking extensions. In the OIP proceeding, Defendant, then represented by counsel, sought a lengthy extension to file his answer. Despite being granted the extension, Defendant again failed to file a response. This failure to respond to the OIP supports the finding that Defendant's default is the instant case was clue to culpability rather than an innocent mistake.

In his reply, Defendant hints that he may not have been properly served. The evidence, however, refutes this suggestion. In his affidavit of service, David Glaister swore that he handed the summons and complaint to the Defendant personally. Mr. Glaister further swore that the person he served admitting being the Defendant. Finally, Defendant's status as a foreign national or an impecunious individual is insufficient to refute the evidence establishing his culpability.

B. Prejudice to the Plaintiff.

"To be prejudicial, the setting aside of a judgment must result in greater harm than simply delaying resolution of the case." Knoebber, 244 Fad at 701. Rather a plaintiff is prejudiced if his ability to pursue his claim will be hindered. See id. (quoting Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984)). Here, Defendant has presented no evidence that the Government will not be hindered if the default judgment is set aside. Defendant's instant motion comes not only at the end of the one-year limitations period of Rule 60, but nearly two full years after he was served with the summons

and complaint in this case. Defendant does not refute that such delay prejudices the Government's ability to obtain depositions and other discovery from witnesses. Moreover, relevant evidence may have been lost or destroyed during this time. In his motion, Defendant appears to make the argument that because his motion was timely under Rule 60, the Government cannot be prejudiced. The Court disagrees. Prejudice in setting aside a default judgment and timeliness under Rule 60, while interrelated due to Rule 55(c), are distinct.

III. Conclusion.

Defendant has failed to meet his burden that he was not culpable for the entry of default and default judgment and that the Government would not be prejudiced by setting aside the default judgment.

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion to Set Aside Default (#16) is DENIED.

NOT VALID UNLESS COUNTERSIGNED BY TRANSFER AGENT
INCORPORATED UNDER THE LAWS OF THE STATE OF NEVADA

CUSIP NO. 16'0079 10 5

Chill Tech Industries, Inc.

AUTHORIZED COMMON STOCK: 75,000,000 SHARES
$0.001 PAR VALUE

THIS CERTIFIES THAT BISCAY MANAGEMENT & CONSULTING LTD.

IS THE RECORD HOLDER OF *TWENTY FIVE THOUSAND*

— Shares of CHILL TECH INDUSTRIES, INC. Common Stock —

transferable on the books of the Corporation in person or by duly authorized attorney upon surrender of this Certificate properly endorsed. This Certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

Witness the facsimile seal of the Corporation and the facsimile signatures of its duly authorized officers.

Dated [illegible]

CHILL TECH INDUSTRIES, INC. CORPORATE Seal NEVADA

SECRETARY

NOT VALID UNLESS COUNTERSIGNED BY TRANSFER AGENT

By

111a

NOT VALID UNLESS COUNTERSIGNED BY TRANSFER AGENT
INCORPORATED UNDER THE LAWS OF THE STATE OF NEVADA

CUSIP NO. 16987N 20 1

Chill Tech Industries, Inc.

AUTHORIZED COMMON STOCK: 75,000,000 SHARES
NON VOTING, $.001

THIS CERTIFIES THAT BISCAY MANAGEMENT & CONSULTING LTD.

IS THE RECORD HOLDER OF *TWENTY FIVE THOUSAND*

— Shares of CHILL TECH INDUSTRIES, INC. Common Stock —

transferable on the books of the Corporation in person or by duly authorized attorney upon surrender of this Certificate properly endorsed. This Certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

Witness the facsimile seal of the Corporation and the facsimile signatures of its duly authorized officers.

Dated [redacted]

CHILL TECH INDUSTRIES, INC. CORPORATE Seal NEVADA

SECRETARY

NOT VALID UNLESS COUNTERSIGNED BY TRANSFER AGENT

112a